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Director's Decisions for California

Native Allotments

1964-1969

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Indian Allotments

1956-1969

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In reply refer to:

Sacramento 050981
050982
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

October 3, 1956.

Registered Mail
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DECISION

Freda Cromwell Meadows : Indian Allotment
Duane E. Meadows : Applications

Manager's Decisions Affirmed

The above named applicants have appealed to the Director of the Bureau of Land Management from decisions by the Manager of the Land Office, Sacramento, California, dated June 22, 1955, rejecting their applications for Indian allotments under Section 4 of the Act of February 8, 1887, as amended (25 U.S.C., 1952 ed., sec. 336), and the regulations contained in 43 CFR, Part 176. Rejection of the applications was based on the classification of the lands involved as suitable for retention in public ownership for timber management purposes. Reports of field examination revealed that the lands sought are highly valuable for the merchantable timber thereon.

Appellants contend that about 30 years ago certain Indians, including the grandmother of appellants, received "timberous land," and that under Regulation 43 CFR 176.9(c) the presence of valuable timber does not warrant the rejection of their allotment applications where settlement was made in good faith. Appellants further state that they have not yet established residence on the lands involved but assert that they should have two years to do so pursuant to 43 CFR 176.8(c) and (d).

The appellants' contention overlooks the fact that all vacant, unreserved, and unappropriated public lands in California were withdrawn from settlement and entry by Executive Order 6910 of November 26, 1934 (43 CFR, 1949 ed., 297.11). Section 7 of the Taylor Grazing Act, as amended (43 U.S.C., 1952 ed., sec. 315f), authorizes the Secretary of the Interior, in his discretion, to examine and classify any lands withdrawn or reserved by Executive Order 6910 and to open such lands to entry, selection, or location in accordance with such classification under the applicable land laws. Consequently, the regulations promulgated by the Secretary of the Interior on Indian allotments have cautioned that public land withdrawn by Executive Order 6910 "is not subject to settlement under section 4 of the General Allotment Act of February 8, 1887, as amended, until such settlement has been authorized by classification" under section 7 of the Taylor Grazing Act (43 CFR, Part 176, fn. 1). In addition, the regulations of the Department issued pursuant to section 7 provide that:

> "The filing of an application which cannot be allowed unless the land is first classified does not give the applicant the right to occupy or settle upon the land. The applicant shall be entitled to the possession and use of the land only after his entry, selection, or location has been allowed, or a lease has been issued. Settlement on the land prior to that time constitutes a trespass." (43 CFR 296.5; emphasis added)

Therefore, inasmuch as the land involved had not been classified under section 7 of the Taylor Grazing Act as suitable for settlement under the Indian Allotment Act, settlement on the lands by the appellants could not give them any equitable preference since such settlement would constitute a trespass. Alexander Bateman et al., A-27203 (November 9, 1955).

For the above reasons, it is concluded that the decisions of the Manager were proper, and are affirmed.

The right of appeal to the Secretary of the Interior is allowed. If such appeal is taken it must be received in this office within 30 days from notice hereof and must be accompanied by a $5.00 filing fee in each case. Strict compliance must be made with 43 CFR Sections 221.31 to 221.34 inclusive, and other pertinent sections of the Rules of Practice, effective May 1, 1956. See Information Sheet attached.

For the Director:
A. H. Furr

Attachment

DISTRIBUTION:

Mrs. Freda Cromwell Meadows (Registered Mail)
Mr. Duane E. Meadows (Registered Mail)
Lands Staff Officer (1)
Appeals List No. 1
CWM

In reply refer to:

Sacramento 051103
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

March 18, 1958

Certified Mail
Return Receipt Requested

DECISION

Theodore H. Freeman : Indian Allotment

Manager's Decision Affirmed

Theodore H. Freeman has appealed to the Director, Bureau of Land Management from a decision of the Manager of the Land Office, Sacramento, California, dated August 24, 1955, which rejected his Indian allotment application, Sacramento 051103, filed under Section 4 of the Act of February 8, 1887, as amended (25 U.S.C., 1952 ed., sec. 334, 336) The application was rejected because the lands applied for were withdrawn from appropriation by First Form Reclamation Withdrawal of November 4, 1913.

In his application, the appellant did not assert any settlement. Mr. Freeman asserts that the rejection was a mistake in that "* * * diligent search was made as to the status of the land through the Tehama County land office and through the Bureau of Land Management of Sacramento, California and by both offices the land was found to be public domain." The record indicates that the land is public domain as is contended by the appellant.

The appellant made application for the $S\frac{1}{2}SW\frac{1}{4}$, section 12, T. 29 N., R. 4 W., M.D. Mer., California. The records indicate that all of section 12 was withdrawn under first form reclamation on November 4, 1913, under sec. 3 of the Act of June 17, 1902, 32 Stat. 388, 43 U.S.C., 1952 ed., 416.

This withdrawal was revoked February 17, 1950 for the lands in said section except for those lands embraced in appellant's application.

The Department has held that lands included in a withdrawal are not subject to disposal under the public land laws, and an application for such land will be rejected, and will not be suspended to await the lifting of the withdrawal. Effie Ellen Cox, A-27175 (December 12, 1955). If the lands are restored they will be subject to the preference rights for veterans arising under the Act of September 27, 1944, as amended, (68 Stat. 253; 43 U.S.C. 279-284).

A withdrawal, otherwise effective, will not be affected by failure to note the withdrawal on the tract books. 43 CFR, 1954 ed., 230.12.

The mere filing of an application for allotment on the public lands does not secure to an Indian a vested right. 43 CFR, 1954 ed., 176.4(c).

Accordingly, the decision of the Manager is affirmed.

Mr. Freeman is allowed the right of appeal to the Secretary of the Interior. If appeal is taken, a Notice of Appeal must be sent directly to the Director, Bureau of Land Management, Washington 25, D. C., in time to be received there within 30 days after receipt by the appellant of this decision, and must be accompanied by a $5.00 filing fee. The appeal must be supported by a Statement of Reasons which may accompany the Notice of Appeal. If a Statement of Reasons does not accompany the Notice of Apppeal, then the Statement must be sent directly to the Secretary of the Interior, Washington 25, D. C., in time to be received there within 30 days after the Notice of Appeal is received by the Director. Strict compliance must be made with the requirements of the rules of practice, 43 CFR, 1956 Supp, Part 221, contained in Circular No. 1950 as amended by Circular No. 1962. See Information Sheet attached.

For the Director:

A.H.

Attachment

DISTRIBUTION:

Mr. Theodore H. Freeman (Certified Mail)
Lands Staff Officer
Appeals List No. 1
EVJ

In reply refer to:

Sacramento 048366
048367
048368
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

March 25, 1958

DECISION

Carole Hayward :
Louis Hayward : Indian Allotment Applications
Ruel Rufus Hayward :

Acting Manager's Decision Reversed

The above-named applicants have appealed to the Director, Bureau of Land Management, from a decision of the Acting Manager, Land Office, Sacramento, California, dated January 16, 1957, rejecting their applications for Indian allotments filed under Section 4 of the Act of February 8, 1887, as amended (25 U.S.C., 1952 ed., sec. 336), and the regulations thereunder (43 CFR, 1954 ed., Part 176). Rejection of the applications was based on the grounds that the lands cannot profitably be devoted to grazing because of the low carrying capacity; that the acreage is not sufficient to form an economical grazing unit, and that the land has been recommended as suitable for small tract classification.

The appellants contend that the land is valuable for grazing purposes and that for several years they have used the land for such purpose. They have submitted a statement with ten signatures certifying that the land is valuable for grazing and that it has been used by the appellants for such purpose. The appellants further state that if the applications are approved, they are planning to fence the property and construct necessary buildings for home use.

The appellants' contention overlooks the fact that all vacant, unreserved, and unappropriated public lands in California were withdrawn from settlement and entry by Executive Order No. 6910 of November 26, 1934 (43 CFR, 1949 ed., 297.11). Section 7 of the Taylor Grazing Act of June 28, 1934, as amended (43 U.S.C., 1952 ed., sec. 315f), authorizes the Secretary of the Interior, in his discretion, to examine and classify any lands withdrawn or reserved by Executive Order No. 6910, and to open such lands to entry, selection, or location, in accordance with such classification under the applicable laws. Consequently, the regulations promulgated by the Secretary of the Interior on Indian allotments have cautioned that public land withdrawn by Executive Order No. 6910 "is not subject to settlement under Section 4 of the General Allotment Act of February 8, 1887, as amended, supra, until such settlement has been authorized by classification" under Section 7 of the Taylor Grazing Act (43 CFR 176 fn. 1). In addition, regulations of the Department issued pursuant to Section 7 provide that:

> "The filing of an application which cannot be allowed unless the land is first classified does not give the applicant the right to occupy or settle upon the land. The applicant shall be entitled to the possession and use of the land only after his entry, selection, or location has been allowed, or a lease has been issued. Settlement on the land prior to that time constitutes a trespass." (43 CFR, 1954 ed., 296.5).

The classification of land under section 7 of the Taylor Grazing Act is made pursuant to the first application properly filed unless the facts and circumstances support another classification as being more in the public interest. Nelson A. Gerttula, 64 I. D. 225, 229 (1957).

It is the policy of the Government to protect the interests of Indians in lands occupied prior to the initiation of rights under the various public land laws. See Solicitor's Opinion, 56 I. D. 395, 398 (1938). This policy was apparently recognized by the Assistant Secretary of the Interior in the case of Alexander Bateman et al., A-27203, (November 9, 1955). In that case the Indian applicants had not initiated a settlement upon the land until 1954 which was some 30 months after the filing of the state indemnity selection. State indemnity selections had been held to be preferred over applications of private persons under the various public land laws as a matter of Departmental policy. Augusta G. Stanley, State of California, A-26959, (November 15, 1954).

Although the Assistant Secretary noted that the Indians were not entitled to any equitable preference over the State since they were occupying the land in trespass, in making the following conclusion he obviously considered them to be entitled to some equitable consideration by reason of their occupancy of the land:

> "As the settlement on the lands involved was made long after the filing of the state selection and it appears that the classification of the lands as suitable for state selection is proper, the decision of the Director was proper."

In the instant appeal there are no conflicting applications of record by the State or any private person. The record also shows that the Indians settled on the land in question some 10 years prior to the time it was first suggested that the lands might be classified under the Small Tract Act. Consequently , the facts and circumstances of this particular case show that favorable classification of the land should be made pursuant to the appellants' applications.

Accordingly, the decision of the Acting Manager is reversed and the cases remanded to the Manager through the Bureau's State Supervisor at Sacramento, California for appropriate action not inconsistent with this decision.

Edward Woozley
Director

DISTRIBUTION
Mrs. Carole Hayward (Regular Mail)
Mr. Louis Hayward (Regular Mail)
Mr. Ruel Rufus Hayward (Regular Mail)
Hon. Clair Engle, Member of Congress
Lands Staff Officer
Appeals List No. 1
ALR

appeal to Sec 7-17-58

Dismissed A 27754 -8-7-58 In reply refer to:

Sacramento 049405, etc.
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

March 28, 1958

Certified Mail
Return Receipt Requested

DECISION

Leroy Henthorne, et al.	:	Indian Allotment Applications

Decisions of the Manager Affirmed

Leroy Henthorne and thirteen other persons 1/ have appealed to the Director, Bureau of Land Management, from decisions of the Manager, Sacramento Land Office, dated April 10 and 11, 1956, which rejected their applications for Indian allotments, filed pursuant to section 4 of the act of February 8, 1887, 25 U.S.C. 334, 336. The applications were rejected because the lands are of very low carrying capacity for the grazing of livestock and inadequate for an economical grazing unit, and because the lands are primarily suitable for timber production and susceptible to timber management by this Bureau.

The appellants assert that:

1. Lands under application for Indian allotment are not subject to classification under the Taylor Grazing Act.

2. The purpose of the Indian Allotment Act was for the granting of non-irrigable lands in the public domain to eligible Indians.

3. The land can be profitably grazed or for the combined purposes of growing Christmas trees, grazing goats, raising apples, gardening and hunting and fishing.

1/ Listed in Appendix "A", attached.

4. They have been precluded from settlement upon the land and from taking possession of it to prove that the land can be profitably utilized for agricultural and other purposes.

5. An Indian allotment application cannot be rejected on the grounds that the lands are too poor in quality or because there is valuable timber on them. A hearing has been requested.

The subject applications for Indian allotment are for public lands located in the vicinity of Laytonville, California. The record indicates there are five or six thousand acres of public domain lands lying in scattered tracts which extend from the vicinity of Laytonville for a distance of ten or twelve miles to the north of Laytonville. Sacramento 049558 covering approximately 162.58 acres comprises a part of a block of approximately 400 acres located in this area. The other 13 applications considered herein involve the major part of a relatively solid block of public domain lands lying on the mountains between Tenmile Creek and the south fork of the Eel River four to seven miles west from Laytonville.

Field reports show that the lands are mountainous, much of which is very rough. Due to timbered areas, areas covered by dense mountain brush, and the rough, mountainous character of a major part of the lands, they are of low capacity and value for the grazing of livestock as it would require 3,750 to 6,000 acres to support 150 units 2/ of livestock on a year long basis. Field reports state that the lands are primarily valuable for timber production, and wildlife and watershed protection and that all of the lands are within a management unit of this Bureau.

All of the vacant, unreserved and unappropriated public lands in California were withdrawn from settlement and entry by Executive Order 6910 of November 26, 1934. Section 7 of the Taylor Grazing Act, as amended (43 U.S.C., 1952 ed., sec. 315f), authorizes the Secretary of the Interior, in his discretion, to examine and classify any lands withdrawn or reserved by Executive Order 6910 and to open such lands to entry, selection, or location in accordance with such classification under the applicable land laws. The Department has held that lands withdrawn by Executive Order 6910 are not subject to settlement under section 4 of the General Allotment Act of February 8, 1887, as amended, *supra*, until such settlement has been authorized by classification under section 7 of the Taylor Grazing Act,

---

2/ 150 or more livestock units are considered an economic range operation by the California Extension Service. *Edward H. Metcalf*, A-23691 (December 11, 1944).

as amended, *supra*. *Alexander Bateman, et al.*, A-27203 (November 9, 1955). The Department held in the matter of *John Johnson*, A-26823 Supp. decided December 18, 1956, that an Indian allotment application for lands primarily suitable for timber production is properly rejected.

The Department recognizes the right of eligible Indians to enter, select, and appropriate public lands in accordance with section 4 of the act of February 8, 1887, as amended, *supra*, however the selection right carries with it no right to a particular tract of land. Refusal to approve a particular application is neither to repudiate nor to destroy that right. That right continues to exist unimpaired and will be permitted to be satisfied when exercised with reference to lands suitable for such disposition. Cf. *G. A. Williams*, A-25972 (December 27, 1950). As to appellants' contention that they have been denied the opportunity to enter upon and take possession of the land the Department has consistently held that the mere filing of an application does not give the applicant the right to enter upon or occupy the land. *Alexander Bateman, et al.*, *supra*. Such unauthorized entry constitutes an act of trespass.

With respect to the requests for a hearing, we believe that the evidence in the record is sufficient to decide the matters on appeal. An applicant is not entitled to a hearing as a matter of right to determine the proper classification of the land sought. *Leonard E. Noren, et al.*, A-27147 (August 1, 1955); *George V. Franklin et al.*, A-26606, *et al.* (June 26, 1953). The requests for a hearing are denied.

The Manager's decisions of April 10 and April 11, 1956, are hereby affirmed.

The parties listed in Appendix "A" are allowed the right of appeal to the Secretary of the Interior. If appeal is taken, a Notice of Appeal must be sent directly to the Director, Bureau of Land Management, Washington 25, D. C., in time to be received there within 30 days after receipt by the appellant of this decision, and must be accompanied by a $5.00 filing fee for each application on which favorable action is sought. Each appeal must be supported by a Statement of Reasons which may accompany the Notice of Appeal. If a Statement of Reasons does not accompany the Notice of Appeal, then the Statement must be sent directly to the Secretary of the Interior, Washington 25, D. C., in time to be received there within 30 days after the Notice of Appeal is received by the Director. Strict compliance must be made with the requirements of the rules of practice, 43 CFR, 1956 Supp., Part 221, contained in Circular No. 1950 as amended by Circular No. 1962. See Information Sheet attached.

For the Director:

A. H.

Attachment

Distribution - Page 4

DISTRIBUTION:

Mr. James W. Morgan, Attorney (Certified Mail)
Mr. Robert L. Winslow, Attorney (Certified Mail)
Mr. Leroy Henthorne (Regular Mail)
Mr. Leroy Henthorne for Elaine Henthorne (Regular Mail)
Violet Scott Henthorne (Regular Mail)
Mr. Leroy Henthorne for Nancie Henthorne (Regular Mail)
Mr. Leroy Henthorne for Leroy Sidney Henthorne (Regular Mail)
Mr. Leroy Henthorne for Howard Henthorne (Regular Mail)
Ann Pollard (Regular Mail)
Mr. Elmer O. Pollard for Anita L. Pollard (Regular Mail)
Mr. Elmer O. Pollard for Marilyn J. Pollard (Regular Mail)
Mr. Elmer O. Pollard for Ronald E. Pollard (Regular Mail)
Mr. Elmer O. Pollard for Nola J. Pollard (Regular Mail)
Mr. Elmer O. Pollard (Regular Mail)
Ruby Feliz for Rita Ray (Certified Mail)
Ruby Feliz (Certified Mail)
Lands Staff Officer (1)
Appeals List No. 1
CFG

APPENDIX "A"

Name	Land Office
	(Sacramento)
Leroy Henthorne	049405
Elaine Henthorne	049431
Violet S. Henthorne	049432
Nancie Henthorne	049450
Leroy Sidney Henthorne	049451
Howard Henthorne	049558
Ann Pollard	049675
Anita L. Pollard	049686
Marilyn J. Pollard	049687
Ronald E. Pollard	049688
Nola J. Pollard	049689
Elmer O. Pollard	049690
Rita Ray	049683
Ruby Feliz	049696

appeal to Sec 6-5
Affirmed A-27706- 12-16-58

In reply refer to:

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

Sacramento 045861
5.04g

April 21, 1958

DECISION

Grover C. Sanderson : Indian Allotment

Hearing Ordered

Mr. Grover C. Sanderson has appealed to the Director of the Bureau of Land Management from the decision of the Acting Manager of the Sacramento, California, Land Office, rejecting in part his application for an Indian allotment. This decision was dated October 6, 1952.

When, on February 15, 1954, Mr. Sanderson submitted his appeal from this decision, it was in conjunction with a second application, under the same law, for the same land. For reasons which will be set forth subsequently, Mr. Sanderson's "appeal" may not be considered, but must be dismissed.

However, Mr. Sanderson's second application for an Indian allotment presents precisely the same questions as would have to be decided in a consideration on the merits of an appeal from the rejection of his first application. Ordinarily, the initial adjudication of an application is done by the land office manager, who has been delegated the authority to act in such matters. But the Director may, in his discretion, assume original jurisdiction himself over any matter awaiting action in a land office. Because of the factual and legal problems presented by Mr. Sanderson's application, it will be considered at this time, even though the land office manager has not rendered any decision in the matter. See Monolith Portland Cement Company et al., 61 I. D. 43 (1952).

Grover C. Sanderson filed an Indian allotment application for 55 acres of land within the Six Rivers National Forest on April 9, 1952. This was done under the provisions of section 31 of the Act of June 25, 1910 (25 U.S.C., 1952 ed., sec. 337) which authorizes the Secretary of the Interior "to make allotments within the national forests in conformity with the general allotment laws, to any Indian occupying, living on, or having improvements on land included within any such national forest. . . . All applications for allotments under the provisions of this section shall be submitted to the Secretary of Agriculture who shall determine whether the lands applied for are more valuable for agricultural or grazing purposes than for the timber found thereon. . . ."

In his application, Mr. Sanderson "solemnly swore" that he had actually, and in good faith, settled on the lands described, and that he had made certain valuable improvements on the property. In a corroborating affidavit, two witnesses, Albert R. Wilder and Mary A. Downs, swore that the applicant was actually living, or had made improvements, on the land involved.

The land applied for was withdrawn for water power use by Power Site Reserve No. 258, April 13, 1912, and Federal Power Project No. 74, October 20, 1920. The applicant, however, stated that his father and uncle had mined the land before him, and that he had lived there, and mined it, since he was a little boy. The Regional Forester for California reported that the applicant's relatives had occupied the land for several generations - probably since 1880 - and that the applicant had resided on the land intermittently throughout his life.

This land is located in what was originally the Klamath Forest Reserve, created by presidential proclamation on May 6, 1905. (On June 3, 1947, the Klamath Forest Reserve was merged with two other National Forests to create the Six Rivers National Forest.) The proclamation establishing the forest reserve excepted from its force and effect "all lands which may have been, prior to the date hereof, embraced in any legal entry or covered by any lawful filing duly of record in the proper United States Land Office, or upon which any valid settlement has been made pursuant to law, and the statutory period within which to make entry or filing of record has not expired: Provided, that this exception shall not continue to apply to any particular tract of land unless the entryman, settler or claimant continues to comply with the law under which the entry, filing or settlement was made." 34 Stat. 3001. (Emphasis supplied.)

One of the laws then in existence pursuant to which a valid settlement could be made was the General Allotment Act of February 8, 1887, section 4 of which (25 U.S.C., 1952 ed., sec. 334) provides that:

> "Where any Indian not residing upon a reservation, or for whose tribe no reservation has been provided by treaty, Act of Congress, or Executive order, shall make settlement upon any surveyed or unsurveyed lands of the United States not otherwise appropriated, he or she shall be entitled, upon application to the local land office for the district in which the lands are located, to have the same allotted to him or her, and to his or her children. * * *.".

What constitutes settlement under this statute is not specified, and the Department's regulations provide only broad criteria for determining this:

> "(a) The nature, character, and extent of the settlement, as well as the manner in which performed, must be fully set forth in the allotment application. In examining the acts of settlement and determining the intention and good faith of the Indian applicant, due and reasonable consideration should be given to the habits, customs, and nomadic instincts of the race, as well as the character of the land taken in allotment.

> "(b) While the act contains no specific requirements as to what shall constitute settlement, it is evident that the Indian must definitely assert a claim to the land based upon the reasonable use or occupation thereof consistent with his mode of life and the character of the land and climate." (43 CFR 176.8)

It would appear that if Mr. Sanderson's settlement was in compliance with the requirements of the Act of February 8, 1887, it is a claim antedating the creation of the national forest, and the land so settled was excepted from inclusion in the national forest, and is therefore not subject to application under the provisions of the Act of June 25, 1910, nor to classification by the Secretary of Agriculture. Cf. *Yakutat and Southern Railway v. Setuck Harry*, 48 L. D. 362 (1921). The application should have been made under the provisions of the Act of 1887; under the regulations adopted pursuant to that statute, the poor agricultural quality of the land, or the presence of valuable timber, would not have required the rejection of an application for an allotment, where the settlement on the land was made in good faith. (43 CFR 176.9(c)).

Nevertheless, the application was submitted to the Secretary of Agriculture for classification, in accordance with the Act of June 25, 1910 - the statute authorizing allotments in National Forests. Twenty acres of the land applied for were found to be more valuable for agriculture than for timber; the remaining thirty-five acres were found to be more valuable for other than agricultural purposes. Accordingly, on October 6, 1952, the Acting Manager of the Land Office, Sacramento, California, rejected Mr. Sanderson's application for the thirty-five acres which had been adversely classified.

The last paragraph of the Acting Manager's decision states:

> "The applicant has 30 days after service of notice hereof within which to appeal from this decision. If no action is taken within the time specified, the application will be rejected and the case closed as to the 35 acres last above described, without further notice. Appropriate action will then be taken as to the E½NE¼NW¼ sec. 29." /i.e., the 20 acres favorably classified by the Secretary of Agriculture./

Mr. Sanderson did not appeal from this decision within the 30 day period allowed. On March 12, 1953, an Indian Trust Patent was issued to Mr. Sanderson for the twenty acres which had been classified as suitable for agricultural purposes.

Eleven months later, on February 15, 1954, Mr. Sanderson filed another Indian allotment application for the 35 acres with respect to which his first application had been rejected (in the decision of October 6, 1952.) In this second application, he stated, "The present application is for the remaining 35 acres contained in application No. 045861 *and is an appeal* from the action of the Secretary of

Agriculture in rejecting my former application as to the 35 acres described above." (Emphasis supplied.)

The decision from which Mr. Sanderson thus attempted to appeal clearly stated that the case would be closed, with respect to the 35 acre tract, unless Mr. Sanderson took action to appeal the decision within 30 days. No such action was taken. The regulation then in effect, 43 CFR 221.64 states in part that:

> "The party aggrieved will be allowed 30 days from receipt of notice in which to file notice of appeal in the land office."

Accordingly, the decision of the Acting Manager is final, and the appeal therefrom is dismissed.[1]

The Land Office Manager has not acted upon the second application for the remaining 35 acres: as previously indicated, the Director will make the initial adjudication in this matter. It is clear that, on the basis of Mr. Sanderson's allegations, this second application should be treated as made pursuant to the Act of February 8, 1887, and is allowable.

However, subsequent events suggest that the "facts" upon which Mr. Sanderson's right to an Indian allotment is predicated may not be correct.

---

[1] The decision was mailed, by registered letter, to Mr. Sanderson at his address of record on October 7, 1952. The Post Office was unable to deliver the letter, and it was returned to the Sacramento Land Office on November 13, 1952. The regulation then in effect, 43 CFR 220.10(f) authorized the serving of notices of decisions involving the right to appeal by registered letter. The service upon a party of notice with respect to a decision may be either actual or constructive: the transmittal by registered mail of a copy of a decision to the address which the appellant had given in his application, and the unsuccessful attempt by the postal service to deliver the document to the appellant at that address, constitute constructive service upon the appellant of the notice. Cornell N. Shelton, A-26441 (October 17, 1952)

Although, under these circumstances, and under the regulations then in force, it might seem appropriate for the Director to waive the late filing (Cf Leo W. Winter, A-27097 (May 25, 1955)), such action is not necessary in view of the careful consideration on the merits which will be accorded the second application. The dismissal of the "appeal" of February 15, 1954, is done primarily to clear the record; it does not determine the applicant's right to the land, which will be decided at a hearing.

On March 8, 1954, a letter was received in the Land Office in Sacramento from Edwin J. Regan, attorney for Mrs. Theodosia F. Caldwell. Mr. Regan stated that Mrs. Caldwell did not know of Mr. Sanderson's original application for Indian Trust Patent to the land until after the patent was issued, and that Mrs. Caldwell has occupied the land included in the patent since 1940, and has a claim to it. The attorney also alleged gross misrepresentation and fraud on the part of Mr. Sanderson:

> "It is a fact that Grover C. Sanderson never made improvements on the land in question, was not occupying or living on the premises at the time he made his application, or for a long période of time prior thereto, nor at any time subseqnent thereto, and that the said Theodosia Caldwell was in full, open and notorious possession of the land in question, claiming the same as her own, and actually operating the premises as a placer mine from 1940, continuously, except for wartime moratoriums, until the present day."

That Mr. Sanderson had not resided continuously on the land, or that he had absented himself from the land for long periods of time, would not, if proven, necessarily substantiate a charge of fraud, for the Department has always taken into consideration, when dealing with Indian allotments, the habits, customs, and nomadic instincts of the race. Cf. Wilbur Martin, Sr., A-25862 (May 31, 1950). However, affidavits from a number of people were subsequently obtained, and indicate that neither Mr. Sanderson nor any of his ancestors had lived on the land prior to its withdrawal in 1912; that the mines on the land had been worked from the 1880's on by Frank Reece and William Whitmore, neither of whom were related by blood or marriage to Mr. Sanderson; that all of the improvements on the land, with the exception of a log cabin built by Mrs. Caldwell, had been erected by Whitmore or Reece; that a distant relative of Mr. Sanderson's became the common law wife of Whitmore, and that after the death of Whitmore, she transferred title to his placer claims to Mr. Sanderson, by means of a quitclaim deed recorded December 9, 1933.

If these allegations are true, and Mr. Sanderson did not settle upon the land until after the date of the power site withdrawal in 1912, then his application should have been rejected in its entirety. Dewey Mose, A-26489 (November 18, 1952). Although the Department can not cancel a trust patent procured by fraud, it may order a hearing to determine whether there is a basis for recommending action in the courts to set the patent aside. Bradley v. Thompson, A-21945 (August 15, 1939). The establishment of these charges would also necessarily require the rejection of Mr.Sanderson's application for the 35-acre tract originally denied him. But neither action may be taken until the truth of the charges has been determined at a hearing. Cf. Claude E. Crumb, 62 I.D. 99 (1955).

An application by an Indian qualified under the Act of February 8, 1887, and supported by the required settlement on unappropriated land confers upon the applicant an absolute right to allotment and patent. Solicitor's Opinion, 57 I.D. 547, 551 (1942). The application is not to be likened to the initial step of one who wishes to obtain the title to the land by future compliance with the law, but rather to the concluding step of one who by full compliance has earned the right to receive the patent.

However, no right arises from an invalid claim of any kind. All must conform to the law under which they are initiated; otherwise they work an unlawful private appropriation in derogation of the rights of the public. Although claims which may be invalid may not be stricken down arbitrarily, so long as the legal title to the land remains in the Government, the Government does have the power, after proper notice and upon adequate hearing, to determine whether the claim is valid, and, if it is found to be invalid, to declare it null and void. Cameron et al v. United States, 252 U.S. 450 (1920). In other words, property claims, even if untenable, may not be invalidated without due process of law, the minimum requirements of which are proper notice and adequate hearing. United States v. Keith V. O'Leary et al, 63 I.D. 341 (1956). 2/

The only problem which remains is to determine at whose instance the hearings should be held. Mrs. Caldwell, through her attorney, has filed a letter which has been treated as a protest. On the basis of the allegations in that letter, a preliminary investigation has been made which satisfies the requirements of 43 CFR 176.14(b)(2).

The letter itself, it should be noted, is not a duly corroborated affidavit, as is required by 43 CFR 176.14(b)(1).

The regulations provide for a hearing "where a party claims equitable rights to lands covered by an Indian allotment for which trust patent has issued, on account of prior settlement and improvements." 43 CFR 176.14(b) Although Mrs. Caldwell's attorney asserts that she claims the land, it is not clear on what theory her claim rests. In the Book of Mining Claims and Water Rights in the Orleans Mining District of Humbolt County is recorded a lease to a mining claim from Grover Sanderson to Theodosia Caldwell. The lease is dated August 30, 1940,

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2/ Section 176.4(c) of 43 CFR states that "The filing of an application for allotment on public lands does not secure to an Indian a vested right." But this regulation must be read with an understanding of its historical background. Since the general withdrawals of November 26, 1934 and February 5, 1935, no public land may be settled under Section 4 of the General Allotment Act of February 8, 1887, until the land has been favorably classified for such settlement by the Secretary of the Interior, or the officer to whom the authority has been delegated. Cf 43 CFR 176.1, footnote; 43 CFR 296. However, a right to an allotment based on a settlement of land prior to the time of these withdrawals is not affected by the withdrawals. Wilbur Martin Sr., A-25862 (May 31, 1950). Consequently, 43 CFR 176.4(c) refers only to those situations, arising since 1934, where applications for Indian allotments are filed prior to settling on the land; the regulation has no application to situations where the claim to an allotment is based on a purported settlement antedating the general withdrawals of 1934 and 1935.

and the claim is on the land which was subsequently included in Mr. Sanderson's trust patent. Mr. Regan has not disputed the fact that his client entered upon the land after having obtained a lease from Mr. Sanderson. Ordinarily, a tenant can not dispute his landlord's title. This estoppel continues, not only to the end of the term, but to the end of the tenant's occupation. Tewksbury v. Magraff, 33 California 237; 16 P 496. This well recognized principle applies to a mineral lease as well as to a lease of land for agricultural or other use. Sabine Lumber Co. v. Broderick, et al., 88 F 2d 586; certiorari denied, 302 U.S. 711.

Indeed, unless Mrs. Caldwell claims to have conducted her mining operations under the color of Mr. Sanderson's lease, all of her activities on this land have been illegal. This land was withdrawn as a power site reserve in 1912, by the Executive Order of April 13 of that year. Until the enactment of Public Law 359, mining locations made on such lands were null and void. Harry A. Schultz et al, 61 I.D. 259 (1953).Public Law 359, called the Mining Claims Rights Restoration Act of 1955 (30 U.S.C., 1952 ed., Supp. IV, sec. 621) now permits mining locations to be made on land withdrawn under the provisions of the Federal Power Act. However, in passing this Act, Congress intended, not to validate claims which were located at a time when the land was withdrawn from entry, but rather to permit new locations, or relocations, on such power site lands, absent other prohibiting factors. 3/ At the time of the enactment of this statute, equitable title to the 20 acre tract on which Mrs. Caldwell had built her cabin and was conducting mining operations had passed to Mr. Sanderson. There was no reservation of mineral content to the United States.

It follows, then, that ever since 1912, and until the present day, the land has not been open to mineral location, or to any other type of lease or disposition. Cf Instructions, 47 L. D. 595, 597 (1920). Mrs. Caldwell, therefore, can have obtained no equitable rights to the lands covered by the Indian Trust patent, for if she is not a lessee of Mr. Sanderson, and therefore estopped to question his title, she is a trespasser.

Consequently, she is not qualified to contest the Indian allotment. Even were she so qualified, she would have to pay the expense of the hearing, and she could acquire no preference right to enter the land in the event of the cancellation of the allotment. 43 CFR 176.14

3/ House Report No. 86, 84th Congress, 1st Session, page 5.

Under the present rules of practice, where the elements of a contest are not present, any objection raised by any person to any action proposed to be taken in any proceeding before the Bureau will be deemed to be a protest and such action will be taken thereon as is deemed to be appropriate in the circumstances. 43 CFR, 1956 Supp., 221.52.

The appropriate action in the present case is to conduct a hearing to determine the validity of Mr. Sanderson's settlement upon the land, in order both to adjudicate the application for the 35-acre tract, and to determine whether or not the trust patent already issued for the 20 acres should be recommended for cancellation.

In deciding these issues, the hearing examiner will be guided by these principles:

If the settlement which is the basis of Mr. Sanderson's claim to this land under the Indian Allotment Act was initiated after April 13, 1912, when the land was withdrawn from entry and reserved as a power site, then as a matter of law the application for the 35 acres may not be allowed, and steps should be taken looking toward the cancellation of the trust patent already issued for the 20 acres.

If the settlement on the land preceded the power site withdrawal, but was subsequent to the inclusion of the land in the Klamath Forest Reserve, then the application may be allowed only upon the favorable classification of the land by the Secretary of Agriculture. If such settlement is established, the trust patent already issued pursuant to the favorable classification of the 20-acre tract would not, of course, be disturbed.

If the settlement preceded the withdrawal of 1905 creating the Klamath Forest Reserve, then the application for the 35-acre tract shall be allowed, and the trust patent already issued for the 20 acres shall remain undisturbed.

In examining the act of settlement and determining the intention and good faith of an Indian applicant, due and reasonable consideration should be given to the habits, customs, and nomadic instincts of the race, as well as to the character of the land taken in allotment. 43 CFR 176.8.

Accordingly, Mr. Sanderson's appeal of February 15, 1954, is dismissed, and a hearing is directed to be held to determine the disposition of his Indian allotment application, filed on the same day.

Mr. Sanderson, Mrs. Caldwell and the General Counsel of the United States Department of Agriculture are allowed the right of appeal to the Secretary of the Interior. Any party who appeals must send a Notice of Appeal directly to the Director, Bureau of Land Management, Washington 25, D. C., in time to be received there within 30 days after the receipt by the appellant of this decision. If either Mr. Sanderson or Mrs. Caldwell appeal, their Notices of Appeal must be accompanied by a $5.00 filing fee. The Department of Agriculture, as a Federal Agency, need not submit a filing fee with its Notice of Appeal.

Each appeal must be supported by a Statement of Reasons which may accompany the Notice of Appeal. If a Statement of Reasons does not accompany the Notice of Appeal, then the Statement must be sent directly to the Secretary of the Interior, Washington 25, D. C., in time to be received there within 30 days after the Notice of Appeal is received by the Director. Strict compliance must be made with the requirements of the rules of practice, 43 CFR, 1956 Supp., Part 221, contained in Circular No. 1950 as amended by Circular No. 1962. See Information Sheet attached.

If an appeal is taken by Mr. Sanderson, then he must serve a copy of all documents on the adverse parties, Mrs. Theodosia F. Caldwell (through her attorney, Mr. Edwin J. Regan, Post Office Box 265, Weaverville, California), and Mr. Jesse R. Farr, Office of the General Counsel, United States Department of Agriculture, Room 216, Federal Office Building, Civic Center, San Francisco, California. If an appeal is taken by Mrs. Caldwell, then she must serve a copy of all documents on Mr. Farr, whose address is given above, and on Mr. Sanderson, who lives at 277 Rivoli Street, San Francisco, California. If an appeal is taken by the representative of the Department of Agriculture, then he must serve a copy of all documents on Mr. Sanderson and Mrs. Caldwell. All documents must be served on adverse parties within 15 days after they are filed in the proper office, and proof of the service, as required by 43 CFR 221.34 and 221.95, must be sent directly to the Secretary of the Interior, Washington 25, D. C., in time to be received there within 15 days after service, unless such proof accompanied the Notice of Appeal.

Earl J. Thomas
Acting Director

Attachment

DISTRIBUTION:
- Hon. Clair Engle, Member of Congress
- Mr. Grover C. Sanderson (Certified Mail)
- Mr. Edwin J. Regan (Certified Mail)
- Mr. Jesse R. Farr, Office of the General Counsel, Dep't. of Agriculture (Certified Mail)
- Mr. Elmer F. Graham, Hearings Administrative Officer
- Lands Staff Officer
- Mr. John Sieker, Forest Service, U. S. Department of Agriculture (8)
- Bureau of Indian Affairs, Washington, D. C.
- Appeals List No. 1
- Mrs. Theodosia F. Caldwell (Regular Mail)

MG

In reply refer to:

Sacramento 050994, etc.
5.04g

May 8, 1958

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

Certified Mail
Return Receipt Requested

DECISION

Roy Wilson, et al. : Indian Allotments

Decision of Manager Affirmed

Roy Wilson and three others 1/ have appealed to the Director, Bureau of Land Management, from a decision of the Manager, Land Office, Sacramento, California, dated January 16, 1957, rejecting their respective applications for Indian allotment of certain public lands under section 4 of the Act of February 8, 1887, as amended (25 U.S.C., 1952 ed., secs. 334, 336) and the regulations thereunder (43 CFR, 1954 ed., Part 176). The applications were rejected for the reasons that the lands are essentially unsuited to grazing and have been classified for leasing under the provisions of the Small Tract Act. 2/

Two of the appellants contend in their appeals that under the provisions of the applicable land laws, an Indian, "* * * if he can prove himself eligible for an allotment, and his good intentions of making settlement on said property, in ways to which he is accustomed, * * *" (he) cannot be deprived of the land applied for. 3/ However, classification is a necessary prerequisite to the allowance of any application for lands withdrawn by Executive Order 6910 of November 26, 1934, as were the lands sought in the subject applications. Public lands withdrawn under this first general order of withdrawal, which included all vacant, unreserved,

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1/ Silvia H. Clark, Sacramento 051769; Juanita J. K. Letson, Sacramento 052849; Mayme Keparisis, Sacramento 052972

2/ Act of June 1, 1938, as amended (43 U.S.C., 1952 ed., Supp. IV, sec. 682a).

3/ The Bureau of Indian Affairs has certified that the appellants are eligible for allotments provided the lands applied for are available for allotment.

and unappropriated public land in California, are not subject to settlement or disposition until they have been classified and opened to entry. Consequently, the regulations promulgated by the Secretary of the Interior on Indian allotments have cautioned that public land withdrawn by Executive Order 6910 "* * * is not subject to settlement under section 4 of the General Allotment Act of February 8, 1887, as amended, until such settlement has been authorized by classification * * *" under section 7 of the Taylor Grazing Act (43 CFR 176 fn. 1). Furthermore, the regulations of the Department issued pursuant to section 7, provide that:

> "The filing of an application which cannot be allowed unless the land is first classified does not give the applicant the right to occupy or settle upon the land. The applicant shall be entitled to the possession and use of the land only after his entry, selection, or location has been allowed, or a lease has been issued. Settlement on the land prior to that time constitutes a trespass." (43 CFR, 1954 ed., 296.5)

In exercising the discretionary authority vested in him to examine and classify withdrawn land under section 7 of the Taylor Grazing Act, supra, the Secretary of the Interior or his delegated representative must weigh all factors affecting the public interest. As a general rule, the first application for a tract of land is accorded prior consideration but that rule does not require that the land applied for be classified for settlement or disposition under that application 4/ if the land is found to be more suitable for uses prescribed or contemplated by other applicable laws, or if the public interest would be better served by disposal under another applicable law. State of California et al., 64 I. D. 459 (1957).

An approved report of field examination discloses that the lands located in close proximity to Weaverville, Trinity County, California, are topographically too rough for cultivation and of low capacity and value for the grazing of livestock. Three of the appellants allege that the 160-acre unit each applied for would provide sufficient grazing area for their individual purposes, while Mrs. Letson stated 465 acres as one unit is sufficient for the livestock of one family.5/ The acreage sought, however, would in each case provide only a very small percentage of the

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4/ Two or more of the small tract applications in conflict with Mrs. Letson's application were prior in point of filing, Sacramento 052180 having been filed on May 1, 1956, and Sacramento 052291 on May 17, 1945, whereas the Letson application was filed September 13, 1956.

5/ This is total of acreages embraced in applications of Mrs. Letson and her two minor children. The appeal with respect to the two latter applications was dismissed by the Land Office Manager since the required filing fees for appeal were not received.

amount of this type of land that would be needed to form an economic grazing unit. On the basis of grazing capacity of 10 acres of land per animal unit, it would require 9,000 acres of such land to provide an adequate grazing unit. 6/ Cf. Edward H. Metcalf, A-23961 (December 11, 1944).

The subject lands are topographically suitable for small tract purposes and have been classified for leasing under provisions of the Small Tract Act, supra. Where classification of land is adverse to an applicant or applicants, and in the absence of an error which appears on the fact of the record, the burden is upon the applicants, if they appeal the classification, to show by positive and substantial evidence that the adverse classification is erroneous. Mary Refugio Jackson et al., A-27236, A-27237 (February 29, 1936). The record reveals no error in classification in the instant case nor have the appellants submitted substantial evidence that would justify disturbing the classification.

Roy Wilson states he is occupying the tract applied for and has built a house on the land. The mere filing of an application for allotment on public lands does not give the applicant the right to enter upon or occupy the land. Alexander Bateman et al., A-27203 (November 9, 1955); 43 CFR, 1954 ed., 176.4(c). Inasmuch as the land had not been classified as suitable for settlement under the Indian Allotment Act, the occupancy by Mr. Wilson could not vest in him any right since the land was not subject to allotment at the time he filed his application. Such unauthorized settlement constitutes an act of trespass. When this decision becomes final the matter of Mr. Wilson's trespass occupancy will be the subject of further review by the local office of this Bureau at Sacramento, California.

The Department recognizes the right of eligible Indians to enter, select, and appropriate public lands in accordance with the Indian Allotment Act. However, the selection right carries with it no right to a particular tract of land. Refusal to approve a particular application is neither to repudiate nor to destroy the Indian's right. That right continues to exist unimpaired and will be permitted to be satisfied when exercised with reference to lands suitable for such settlement and disposition. Cf. G. A. Williams, A-25972 (December 27, 1950). The appellants are therefore not precluded from applying for allotment of other tracts of land if they so desire.

6/ The University of California Extension Service considers an economic range operation requires enough land to support 150 units of livestock.

Mrs. Letson and Mrs. Keparisis contend that an Indian should not be required to pay an appeal fee because the Indian Allotment Act expressly states Indians shall not be charged fees or commissions. The fees contemplated by the act are fees or commissions ordinarily charged an entryman upon entry or settlement on public lands under the general laws for the disposition of public lands, whereas the fees in issue here are filing fees required by the rules of practice for the consideration of appeals involving public land matters (43 CFR, 1956 Supp., Part 221). The fee for appeal was not envisioned at the time of the enactment of the Indian Allotment Act, that act having been passed long prior to revision of the rules of practice (21 F. R. 1860) making it mandatory that with certain exceptions not pertinent here an appeal involving a public land matter be accompanied with a filing fee.

The requests of Mr. Wilson and Mrs. Clark for a hearing under 43 CFR 221.6 of the rules of practice are denied, inasmuch as factual data necessary to properly determine the issues on appeal are matters of official records. Cf. Leonard E. Noren et al., A-27147 (August 1, 1955).

On the basis of the evidence of record, the rejection of the appellants' applications for Indian allotments was correct. The Manager's decision is accordingly affirmed.

Each party is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See attached Form 4-1365. In taking an appeal there must be strict compliance with the regulations.

For the Director:

A. H.

Attachment

DISTRIBUTION:

Mr. Edwin J. Regan, Attorney at Law (Certified Mail)
Mr. Roy Wilson (Regular Mail)
Mrs. Silvia Holt Clark (Certified Mail)
Mrs. Juanita J. K. Letson (Certified Mail)
Mrs. Mayme Keparisis (Certified Mail)
Commissioner, BIA, Att: Chief, Acquisition & Disposal Section
Area Director, BIA
Lands Staff Officer (1)
Appeals List No. 1
MAG

In reply refer to:

Sacramento 053349
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

May 21, 1948
1958

DECISION

Elmer Smith : Indian Allotment

Appeal Dismissed

On April 23, 1957, the Manager of the Sacramento Land Office rejected the application for an Indian Allotment filed by Elmer Smith on the ground that the land applied for had been withdrawn from entry, location, or other disposal. Mr. Smith was informed that "* * * an appeal, if filed, must be received in this office within 60 days from your receipt of this decision * * *." Mr. Smith received the decision on May 29, 1957; his notice of appeal was filed in the Sacramento Land Office on July 26, 1957, within the specified 60-day period.

The rules which govern practice before this Bureau state that an appeal to the Director must be filed in the proper office within 30 days after the person taking the appeal received the decision. 43 CFR 221.2. The rules of practice further state that no extension of time will be granted for filing the notice of appeal. Ibid. The action of the Manager in allowing the applicant 60 days within which to appeal from the adverse decision was therefore unauthorized, and the appeal, filed after the expiration of the 30-day appeal period, may not be considered.

However, it is noted that in his appeal Mr. Smith alleges that his family "* * * have occupied and used this land since before 1918." That Mr. Smith may have resided upon this land prior to its withdrawal was not known to the Manager when he rejected the application.

The case is therefore remanded to the Manager of the Land Office, through the Bureau's State Supervisor at Sacramento, with the recommendation that the application be reinstated and the applicant's claim as to his settlement on the land be investigated.

For the Director:

G. H. Dunn

Distribution - Page 2

DISTRIBUTION:

Mr. Elmer Smith (Regular Mail)
Bureau of Indian Affairs, Washington, D. C. (1)
Lands Staff Officer (1)
Appeals List No. 1
MG

In reply refer to:
Sacramento 052431
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

October 8, 1958

Certified Mail
Return Receipt Requested

DECISION

Henry C. Hancorne : Indian Allotment Application

Decision of Manager Affirmed

Henry C. Hancorne filed an appeal on October 19, 1956, from the Manager's decision of September 6, 1956, rejecting his Indian allotment application for the E$\frac{1}{2}$SE$\frac{1}{4}$ sec. 36, T. 10 N., R. 2 E., Humboldt Meridian, California.

The decision, which was received by the appellant on September 14, 1956, stated an appeal could be filed within 60 days from receipt thereof. It was not within the Manager's authority, however, to allow an appeal period of more than the 30 days prescribed by the rules of practice (43 CFR, 1956 Supp., 221.2). 1/ The Manager has no authority to waive or modify a rule of practice of the Department. Warn v. Field et al, 6 L.D. 236 (1887). Accordingly, the appeal, not having been received within 30 days from the date of the Manager's decision, was not timely and cannot be considered.

Aside from the procedural defect, however, there would be no substantial basis for changing the Manager's decision, for the stated reason that the land in issue was granted to the State of California in aid of common schools, by the Act of March 3, 1853 (10 Stat. 244). By this act, Congress granted to the State of California numbered sections 16 and 36 of public land in each township for school purposes. The grant of the school section here in issue attached to the State on the date of acceptance of the plat of survey thereof.

The rights of the State having attached to the subject section 36 when the school land grant became effective, the land was thus removed from the category of public land and is not subject to disposal under the public land laws. In these circumstances, the Manager properly rejected the appellant's application.

1/ The rules of practice in effect at the time of the Manager's decision are contained in 43 CFR, 1956 Supp., Part 221.

The appellant's request for a hearing under 43 CFR 221.6 of the rules of practice is denied, inasmuch as the data necessary to properly determine the issue on appeal are matters of official records. See Clear Gravel Enterprises, Inc., 64 I.D. 210, 213 (1957).

The decision of the Manager is affirmed.

This decision is without prejudice to the right of the appellant to apply for allotment of another tract of land if he so desires.

Mr. Hancorne is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See attached Form 4-1365. In taking an appeal there must be strict compliance with the regulations.

For the Director:

Attachment

DISTRIBUTION:

Mr. Henry C. Hancorne (Certified Mail)
Lands Staff Officer (1)
Appeals List No. 1
MAG

43552

In reply refer to;

Sacramento 047411
047412
047494
047495
047496
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

October 8, 1958

Certified Mail
Return Receipt Requested

DECISION

William Koontz et al. 1/ : Indian Allotment Applications
:
:

Decisions of the Manager Affirmed, as Modified

William Koontz and four of his minor children have appealed from a decision of the Manager which rejected their Indian allotment applications for the stated reasons that the lands are unsuitable for grazing and are classified as more valuable for the production of timber and should be retained in government ownership for the management of the timber resources.

As to the applications in Sacramento 047412, 047494, and 047495; these applications each embrace two or more disconnected, non-contiguous, public land tracts. The departmental regulation in 43 CFR, 1954 ed., 176.11(a)(2), provides that:

> "An allotment to a minor child need not be contiguous to that made by the head of a family; but it is required that each allotment made to an individual, whether the head of a family, a single adult, or a minor child, when such allotment embraces more than one legal subdivision, must be composed of contiguous tracts, as in ordinary disposition of the public domain under a settlement law. An additional allotment must be governed by the same rule."

1/ The names of applicants, corresponding land office serial numbers, and the legal description of the lands involved are enumerated on Appendix A.

The regulation in 43 CFR, 1954 ed., 176.9 concerning the character of lands enterable under section 4 of the General Allotment Act of February 8, 1887, as amended, (25 U.S.C. 336) provides in applicable portion that:

> "(a) The law provides that allotments may include not to exceed 40 acres of irrigable land, 80 acres of nonirrigable agricultural land, or 160 acres of nonirrigable grazing land.
>
> "(b) Irrigable lands are those susceptible of successful irrigation at a reasonable cost from any known source of water supply; nonirrigable agricultural lands are those upon which agricultural crops can be profitably raised without irrigation; grazing lands are those which cannot be profitably devoted to any agricultural use other than grazing."

The record in these cases specifically points out that the lands involved are rough and mountainous and are not susceptible of cultivation either by irrigation or by ordinary dryland farming methods and that the lands are timber lands that have no value for livestock grazing. Furthermore, the lands contain valuable stands of commercial timber and are being managed by this Bureau along with other timber lands in the area as a part of a timber management unit. The Department has held in similar cases that public lands should be retained in public ownership State of California, 59 I.D. 451, 452 (1947). Therefore, the lands are not of the type to be properly classified for entry under the General Allotment Act.

The rule -- that an application for an allotment for lands upon which, settlement has been made in good faith cannot be denied on the grounds that the lands are too poor in quality or contains valuable timber, Wilbur Martin, Sr., A-25862 (May 31, 1950); 43 CFR 1954 ed., 176.9(c) -- is inapposite to the issue in the present appeals as there has been no settlement and no settlement rights are involved. [2]

The statements of the appellants that the lands can be developed for agricultural purposes is not accompanied by any persuasive evidence that the lands are of the character alleged or suitable for entry under the General Allotment Act. Therefore, the decisions of the Manager are hereby affirmed as modified.

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[2] Lands withdrawn by Executive Order No. 6910, as are the subject lands, are not subject to settlement under sec. 4 of General Allotment Act until such settlement has been authorized by classification under Sec. 7 of the Taylor Grazing Act (43 CFR, 1954 ed., 176 fn. 1). Nor does any rights vest as a result of the filing of an application. Carole Hayward et al., Sacramento 048366 etc. (March 25, 1958).

The parties listed in Appendix A are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR, Part 221, as amended. See enclosed Form 4-1365. In taking an appeal there must be strict compliance with the regulations.

For the Director:

A.H. Dunn

Enclosure

DISTRIBUTION:

Mr. Francis B. Mathews, Attorney at Law (Certified Mail)
Each Applicant (Regular Mail)
Appeals List No. 1
Lands Staff Officer (1)
CFG

APPENDIX "A"

Name of Applicant	Land Office Serial No. (Sacramento)	T.	R.	Legal Description Sec. (H. M., California)	Subdivision
Mr. William Koontz	047411	1S.	1W.	17	SW¼NW¼,N½SW¼,SE¼S
Mr. George William Koontz	047412	1S.	1E.	6	SE¼SW¼
				7	E½NW¼
				19	NE¼NW¼
Miss Marjorie Claire Koontz	047494	1S.	1W.	7	SE¼SW¼
				13	SW¼NW¼
				24	NE¼SE¼
Mr. Thomas Harold Koontz	047495			2	NE¼SW¼,SW¼SW¼
				5	SE¼SE¼
				10	NW¼NE¼
Mr. Richard Henry Koontz	047496			13	W½SW¼
				14	Lots 8, 9

In reply refer to:

Sacramento 054320
054321
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

November 5, 1958

Certified Mail
Return Receipt Requested

DECISION

Edward E. Mitchell	:	Indian Allotment
Irene Pallin	:	
	:	

Acting Manager's Decision Vacated, Case Remanded

Edward E. Mitchell has appealed from a decision of the Acting Manager, dated September 11, 1957, which rejected his Indian allotment application because his sister, Irene Pallin, was the successful drawee for the tract.

The appellant and Irene Pallin filed simultaneous applications for a 160 acre tract previously occupied and improved by their mother, Teresa Mitchell. Mrs. Pallin described in her application the 160 acres as non-irrigable agricultural land. Mr. Mitchell described the land as non-irrigable agricultural and non-irrigable grazing land.

The applicable regulations provide that an allotment may not exceed 40 acres of irrigable land, 80 acres of non-irrigable agricultural land, or 160 acres of non-irrigable grazing land. 43 CFR, 1954 ed., 176.9(a). The record does not disclose that there has been a determination of the character of the land. Since the acreage allowed under the regulations is dependent upon land classification, the Mitchell application should not have been rejected by the Acting Manager on the basis of the premature drawing.

Accordingly, the Acting Manager's decision is vacated. When this decision becomes final, the cases will be remanded to the Manager through the State Supervisor, California, for further appropriate action looking to land classification and consideration of the legal and equitable factors involved.

Mr. Mitchell and Mrs. Pallin are each allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. In taking an appeal there must be strict compliance with the regulations.

If an appeal is taken by Mr. Mitchell, then the adverse party to be served is Mrs. Irene Pallin, Weitchpec, California. If an appeal is taken by Mr. Pallin, then the adverse party to be served is Mr. Edward E. Mitchell, Weitchpec, California.

For the Director:

Enclosure

DISTRIBUTION:

SS(California) w/case records Sac. 054320, etc.
Edward E. Mitchell (Regular Mail)
Edwin J. Regan, Attorney at Law (Certified Mail)
Lands Staff Officer
Appeals List No. 1
EVJ

INDIAN ALLOTMENTS - A. A. Generally

An application for Indian allotment is generally rejected where the land applied for is classified for grazing because of the low carrying capacity and the acreage is not sufficient to form an economic grazing unit, and where the land [illegible] valuable [illegible] [illegible] [illegible] [illegible] [illegible].

[illegible], Sacramento [illegible] (June 16, 1960)

Mr. Mitchell and Mrs. Wallin are each allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended [illegible] enclosed Form 4-1365. In taking an appeal there must be strict compliance with the regulations.

If an appeal is taken by Mr. Mitchell, then the adverse party to be served is Mrs. [illegible] Wallin, [illegible], Nevada. If an appeal is taken by Mrs. Wallin, then the adverse party to be served is Mr. Edward H. [illegible] Mitchell, [illegible], California.

For the Director

Enclosure

[illegible]

[illegible]
[illegible]
[illegible]
[illegible]
[illegible]
[illegible]

INDIAN ALLOTMENTS * 1 Generally

An application for Indian allotment is properly rejected where the land applied for is unsuitable for grazing because of its low carrying capacity and the acreage is not sufficient to form an economic grazing unit, and where the land provides vitally needed access to stock water.

John R. Moseley, Sacramento 052993 (March 16, 1959)

In reply refer to:

Sacramento 052993
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

March 16, 1959

Certified Mail
Return Receipt Requested

DECISION

John R. Moseley : Indian Allotment Application

Manager's Decision Affirmed

John R. Moseley has appealed from a decision of the Manager rejecting his application for an Indian allotment, filed pursuant to section 4 of the act of February 8, 1887, as amended (25 U.S.C., 1954 ed., sec. 334, 336). The application was rejected for the reasons that the land sought is not suitable for grazing because of its low carrying capacity and the acreage is not sufficient to form an economic grazing unit.1/

The lands are located about four to five miles east of Likely, California. The report of field examination shows that (1) the topography is rough with slopes varying from 10 to 40 percent; (2) sheer basalt cliffs 20 to 60 feet in height are also found; (3) the vegetation cover varies from light on the gentler slopes to medium in density on the more inaccessible slopes; (4) and the carrying capacity varies from 10 to 15 SA/AUMs with an average for the entire tract of 12 SA/AUMs. At 12 SA/AUMs, the tract (containing 160 acres), which is too rough and rocky for agricultural purposes, can not be considered an economic unit for non-irrigable grazing land.2/ Edward H. Metcalf, A-23961 (December 11, 1944).

1/ Application filed for the NE¼, sec. 12, T. 39 N., R. 13 E., M.D.M., California.

2/ The University of California Extension Service considers an economic range operation requires enough land to support 150 units of livestock. Cf. Roy Wilson et al., Sacramento 050994 (May 8, 1958). Even if the carrying capacity of the land is considered to be 15 SA/AUMs, 180 acres

(Footnote 2/ continued on bottom of page 2)

The question in issue is one of proper classification and the appellant has submitted no positive and substantial evidence that the classification is in error. Where classification of land is adverse to the applicant, and in the absence of an error which appears on the face of the record, the burden is upon the applicant, if he appeals the classification, to show by positive and substantial evidence that the adverse classification is erroneous. Cf. Mary Refugio Jackson et al., A-27236 (February 29, 1956).

Moreover, the record shows that the land in issue affords the only access route from the south to the tablelands allotment area. During the late summer when the reservoirs on the tablelands dry up, the only available water for livestock is the South Fork of the Pit River, which can be reached only through the land in issue.

Accordingly, the decision of the Manager is affirmed.

Mr. John R. Moseley is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. In taking an appeal there must be strict compliance with the regulations.

For the Director:

Enclosure

DISTRIBUTION:

Bureau of Indian Affairs, Sacramento, California (Regular Mail)
Mr. John R. Moseley (Certified Mail)
Lands Staff Officer
Appeals List No. 1
ALR

(Footnote 2/ continued from page 1)
or equivalent forage would be required to sustain one cow for a period of a year. Although the appellant indicates that, in addition to the four forty-acre subdivisions he has applied for, members of his family have applied for six forty-acre subdivisions, it is obvious that the ten subdivisions, comprising approximately 400 acres, could not be profitably devoted to grazing. Cf. 43 CFR 176.9(b).

LO(Sac)

INDIAN ALLOTMENTS * 1 Generally

Applications for Indian allotments in behalf of minor children must be rejected where there has been no showing that the parent of each minor child had made a prior settlement on public lands.

Evelyn A. Lyons Long et al., Sacramento 050422, etc. (March 20, 1959)

LO

In reply refer to:
Sacramento 050422, etc.
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

March 20, 1959

Certified Mail
Return Receipt Requested

DECISION

Evelyn A. Lyons Long et al. : Indian Allotment Applications

Decisions of Manager Affirmed

Evelyn A. Lyons Long and three others, who made application for Indian allotments on certain public lands in behalf of minor children, 1/ have appealed from decisions of the Manager requiring that they each file, within 30 days from notice thereof, evidence showing that the parent of each minor child had a valid settlement on the public domain prior to filing the application in behalf of the child.

The requirement was made by the Manager on the basis that the law under which the applications were filed only permits one entitled herself under the fourth section, to take allotments thereunder in behalf of her minor children. In support of his holding the Manager cited (1) Cynthia Martha Sweeney, 40 L.D. 148 (1911), wherein the Department held that section 4 of the Act of February 8, 1887, authorizes allotment of public lands in behalf of minor children of an Indian only where the parent has settled and made her home upon the public domain, and (2) section 176.12 of the regulations 43 CFR Part 176 implementing the act, which provides that no actual settlement is required in case of allotments to minor children under the fourth section, but the actual settlement of the parent, or of a person standing in loco parentis, on her own public land allotment will be regarded as the settlement of the minor children.

The Manager's decision further held that classification of the land would be necessary before an Indian allotment could be granted, but this matter is not an issue in the appeals.

The Manager was correct in his interpretation of the law and the regulations. Cynthia Martha Sweeney, supra; see also Ellen Bourassa et al., 43 L.D. 149 (1914).

1/ Listed in Appendix "A" attached.

Although not material to this decision, it is noted that Marlene Bauer (Los Angeles 050573) is no longer a minor, and Bunny Nowlin (Los Angeles 050922) is married and has a family. Since Mrs. Bauer is now of age she could, if qualified, file a new application in her own name and upon approval thereof and her settlement on the land, she could then apply in behalf of her children. In the same manner, Bunny Nowlin (now Bunny Nowlin Strother), since she is married and emancipated, may make an allotment application in her own name and after its approval, apply for allotments for her two children. 2/ (43 CFR, 1954 ed., 176.12-172-13).

Applications for allotments filed by two of the appellants in their own names, 3/ one of which was made subsequent to applications for her minor children, indicate the appellants have made no settlement on public land. Therefore, the applications for the appellants' minor children were properly rejected and any future action by either of these two appellants to make an allotment for herself would not validate such applications, nor could those applications be revived. The decisions of the Manager are affirmed.

Each appellant is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. In taking an appeal there must be strict compliance with the regulations.

For the Director:
John B. Piccolo

Enclosure

DISTRIBUTION:
Mrs. Evelyn A. Lyons Long (Certified Mail)
Mrs. Frances Duncan (Certified Mail)
Mrs. Zella Smalley Nowlin (Certified Mail)
Mrs. Madeline D. Lyons Lovell (Certified Mail)
Lands Staff Officer (1)
Appeals List No. 1
Case Records, Sacramento 051245, 051247
MAG

2/ It is suggested if Bunny Nowlin Strother is interested in submitting another application that she substitute other land for that here described. These lands were included in prior Indian allotment application Sacramento 049558, filed February 7, 1955, which was rejected because the lands are primarily suitable for timber production and susceptible to timber management by this Bureau. Director's decision, Leroy Henthorne et al., Sacramento 049405, etc. (March 28, 1958).

3/ Evelyn A. Lyons Long, Sacramento 051245, filed September 20, 1955. Madeline D. Lyons Lovell, Sacramento 051247, filed September 20, 1955.

APPENDIX "A"

Applicant	Application Filed in Behalf of	Serial No. Sacramento
Evelyn A. Lyons Long	Sterling L. Long	050422 ✓
	Lonnie R. Long	050476 ✓
	Clois Grover Long	050478 ✓
	Loren L. Long, Jr.	050481 ✓
	Arlon R. Long	050482 ✓
	Kenlyn H. Long	051244 ✓
Frances Duncan *	Marlene Bauer	050573 ✓
	Leonard Ray Bauer	050577 ✓
	Gordon Lewis Bauer	050578 ✓
Zella Smalley Nowlin	Bunny Nowlin	050922 ✓
Madeline D. Lyons Lovell	Gwen Jacqueline Lovell	051246 ✓
	Gordon Daniel Lovell	051248 ✓

---

* Appeals signed by Marlene Bauer

appeal to Sec.
affirmed A-28119 1-15-68 20(Sec)

INDIAN ALLOTMENTS * 1 Generally

PUBLIC SALE * 3 Classification

An application for Indian allotment filed under section 4 of the act of February 8, 1887, is properly rejected where the land applied for is unsuitable for grazing and has been classified for disposal by public sale.

Lillian Shermoen, Sacramento 052487 (April 10, 1959)

RO

In reply refer to:
Sacramento 052487
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

April 10, 1959

Certified Mail
Return Receipt Requested

DECISION

Lillian Shermoen : Indian Allotment Application

Manager's Decision Affirmed

Lillian Shermoen has appealed from a decision of the Manager which rejected her Indian allotment application filed pursuant to section 4 of the act of February 8, 1887, as amended (25 U.S.C., 1954 ed., sec. 334, 336), for the stated reason that the land is topographically unsuitable for cultivation and not valuable for nonirrigable grazing use because of the lack of forage resources. The tract was classified as suitable for disposal by public sale.

The land is an isolated tract located in Del Monte County, approximately 20 miles north of Crescent City, California. The report of field examination discloses that the tract is rough and mountainous and is not susceptible of cultivation either by irrigation or by ordinary dryland farming methods and that the land is timber land that has no value for livestock grazing. The land supports a good stand of timber, much of which is of merchantable size. The tract is not included in a timber management unit. The record indicates the grazing value to be relatively negligible and that the acreage sought would provide only a very small percentage of the amount of this type of land that would be needed to form an economic grazing unit. No evidence of occupancy was noted by the field examiner.

The question in issue is one of proper classification. Where classification of land is adverse to an applicant, and in the absence of an error which appears on the face of the record, the burden is upon the applicant, if he appeals the classification, to show by positive and substantial evidence that the adverse classification is erroneous. *Mary Refugio Jackson et al.*, A-27236 (February 29, 1956). The record reveals no error in classification in the instant case nor has appellant submitted substantial evidence that would justify overturning the classification.

The appellant's statement of reasons for her appeal has been carefully considered. It provides no basis for changing the classification of the land. The appellant's application was properly rejected. *Roy Wilson et al.*, Sacramento 050994 (May 8, 1958).

The Department recognizes the right of eligible Indians to enter, select, and appropriate public lands in accordance with the Indian Allotment Act. However, the selection right carries with it no right to a particular tract of land. Refusal to approve a particular application is neither to repudiate nor to destroy the Indian's right. That right continues to exist unimpaired and will be permitted to be satisfied when exercised with reference to lands suitable for such settlement and disposition. Leroy Henthorne et al., Sacramento 049405 etc. (March 28, 1958). The appellant is therefore not precluded from applying for an allotment of another tract of land if she so desires.

The decision of the Manager is affirmed.

Mrs. Lillian Shermoen is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. In taking an appeal there must be strict compliance with the regulations.

For the Director:
John B Piccolo

Enclosure

DISTRIBUTION:

Mr. Edwin J. Regan, Attorney for appellant (Certified Mail)
Mrs. Lillian Shermoen (Regular Mail)
Commissioner, BIA, Att: Chief, Acquisition & Disposal Section
Lands Staff Officer
Appeals List No. 1
ALR

INDIAN ALLOTMENTS * 1 Generally (Classification)

Indian allotment applications for lands withdrawn for classification under the Taylor Grazing Act are properly rejected absent a proper showing that the lands are of a character suitable for the establishment of a home for an Indian family and that income that may be derived from the land sought together with any outside income available to Indian settlers in the area is sufficient to sustain the needs of an Indian family.

Rose A. Gilbert et al., Sacramento 051001 etc. (November 2, 1959)

In reply refer to:

Sacramento 051001, etc. 1/
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

November 2, 1959

Certified Mail
Return Receipt Requested

DECISION

Rose A. Gilbert et al. 1/ : Indian Allotment Applications

Decisions of the Manager Affirmed

Rose A. Gilbert and the other applicants identified below have appealed from decisions of the Manager which rejected their Indian allotment applications filed pursuant to section 4 of the act of February 8, 1887, as amended(25 U.S.C. 336) for the stated reasons that the lands applied for do not constitute an economic grazing unit.

Section 4 of the 1887 act, as amended, provides for the entry of unreserved vacant public lands. The lands here involved were withdrawn from settlement, location sale or entry by Executive Order No. 6910 of November 26, 1934, and are now subject to disposition under the Indian Allotment and other public land laws only when classified for such disposal. Edward H. Metcalf, A-23961 (December 11, 1944). The regulation in 43 CFR, 1954 ed., 176.9 concerning the type of land that may be acquired by a qualifi Indian applicant provides that the land need not necessarily be cultivable and that lands suitable only for grazing may be acquired under the act. Moreover, it is the express policy of the Department to protect the interest of the Indians. See Solicitor's Opinion,56 I.D. 395, 398 (1938).

However, it is clear from the language of the act and decisions and instructions issued by the Department that the intent of the act is to afford Indians the opportunity to settle and establish homes upon the

---

1/	Rose A. Gilbert	Sacramento 051001
	Darlene Gilbert	050983
	Eleanor R. Gilbert	050997
	Marion Gilbert	050998
	Barbara Gilbert	050999
	Jack W. Gilbert	051000
	Kenneth Gilbert	051002

Rose A. Gilbert filed all the applications, one for herself and the others for her minor children. A minor's application would not be allowable until the mother's application had been allowed. 43 U.S.C. 176.12.

public lands and that any Indian who acquires public land under the act will not only settle upon the land but will also obtain such economic return from the land as would justify such settlement. See Lacey v. Grandorf et al., 38 L.D. 553 (1910); also see instructions issued by the Department in 32 L.D. 17 (1903). In this respect it is proper to consider the inherent ways of the Indian with respect to his economic demands consistent with his mode of life. However, there is nothing in the record to show that the lands here involved are of a character suitable for settlement by Indians or that the lands would provide any substantial contribution to family income. In fact, detailed field reports indicate that the lands are so sparse that it is doubtful if the grazing value would justify the construction and maintenance of fences or other improvements that would be required if the lands were to be utilized for any agricultural purposes including grazing use.

The appellants assert that part time employment is available at Chico, Butte County, California. However, they have furnished no details concerning the duration or the amount of income that would be derived from such employment or that such employment is typical of the type ordinarilly obtained by Indian settlers. The regulation under the 1887 act 43 CFR, 1954 ed., 176.9(c), contains the provision that "Where an Indian makes settlement in good faith upon lands not reserved therefrom, an allotment therefor cannot be denied on the grounds that the lands are too poor in quality." However, there has been no settlement on the lands here involved and the applicants have obtained no rights in the land by virtue of their applications. Moreover, no such rights could attach unless or until the lands were classified as suitable for disposal under the 1887 act. See Alexander Bateman, et al., A-27203 (November 9, 1955).

In the circumstances we believe that the decisions of the Manager were correct and they are hereby affirmed.

Rose A. Gilbert et al., are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. In taking an appeal there must be strict compliance with the regulations.

For the Director:

Enclosure
DISTRIBUTION:
Rose A. Gilbert (Certified Mail)
Darlene Gilbert (Certified Mail)
Eleanor R. Gilbert (Certified Mail)
Marion Gilbert (Certified Mail)
Barbara Gilbert (Certified Mail)
Jack W. Gilbert (Certified Mail)
Kenneth Gilbert (Certified Mail)
Lands Staff Officer
Appeals List No. 1
CFG

IN REPLY REFER TO:
Sacramento 0[illegible]
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

January [illegible]

[illegible]
[illegible]

DECISION

Jesse H. Boggs [illegible]

[illegible]

Jesse H. Boggs has appealed from a decision of the Manager, dated October 1[illegible], 195[illegible], rejecting his [illegible] application for [illegible] grazing land [illegible] pursuant to section 7 of the Act of [illegible], as amended (43 U.S.C., 1958 ed., 315f). The application was rejected because the land is [illegible] for grazing and more valuable for forestry purposes.

The land in question is an isolated tract of public land adjoining the [illegible] National Forest. The record discloses that the topography of the land is extremely sloping to steep and is covered with coniferous forest. Small clearings, [illegible], are located [illegible]; however, the aggregate area of these clearings is estimated at less than five acres.

The present grazing capacity of the land is [illegible] with a potential capacity of [illegible]. Since the University of California Extension Service stated that a minimum of approximately [illegible] is necessary for an economic grazing unit, over [illegible] acres of land similar to the land under application would be required to support the necessary amount of livestock. Thus, [illegible] in the [illegible] for an economic grazing unit of this type of land and an [illegible] application for [illegible] grazing [illegible] must be rejected. [illegible] et al., [illegible] (May [illegible]); cf. [illegible] ([illegible]).

Although Mr. Boggs has stated that, in his opinion, the classification is not correct, he has not submitted any evidence to [illegible] the classification. Where a classification of land is adverse to an applicant, he must show by positive and substantial evidence that [illegible] the land [illegible] at the time of the [illegible]. [illegible] et al., A-[illegible] ([illegible]).

The Department recognizes the right of [illegible] to select, exchange, and appropriate public lands in accordance with the [illegible]. However, the [illegible] right [illegible] the right to

In reply refer to:
Sacramento 052168
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

January 22, 1960

Certified Mail
Return Receipt Requested

DECISION

Ione H. Stapp : Indian Allotment

Manager's Decision Affirmed

Mrs. Ione H. Stapp has appealed from a decision of the Manager, dated October 12, 1959, rejecting her Indian allotment application for nonirrigable grazing land filed pursuant to section 4 of the Act of February 8, 1887, as amended (25 U.S.C., 1958 ed., 334-336). The application was rejected because the land is unsuitable for grazing and more valuable for forestry purposes.

The land in question is an isolated tract of public land adjoining the Six Rivers National Forest. The record discloses that the topography of the land is moderately sloping to steep and is covered with coniferous forest. Small clearings, where the majority of the forage is found, are located along a ridge top; however, the aggregate area of these clearings is estimated at less than five acres.

The present grazing capacity of the land is 20 AUMs with a potential capacity of 30 AUMs. Since the University of California Extension Service states that a minimum of approximately 150 cows or 750 sheep is required for an economic grazing unit, over 8,000 acres of land similar to the land under application would be required to support the necessary amount of livestock. Thus, the 160 acre tract for which Mrs. Stapp has applied is far short of the acreage necessary for an economic grazing unit of this type of land and an Indian allotment application for nonirrigable grazing land that does not constitute an economic grazing unit must be rejected. Roy Wilson et al., Sacramento 050993 (May 8, 1958); Cf. Edward H. Metcalf, A-23961 (December 11, 1944).

Although Mrs. Stapp has stated that, in her opinion, the classification is not correct, she has not submitted any evidence to justify changing the classification. Where a classification of land is adverse to an applicant, he must show by positive and substantial evidence that the classification is erroneous unless an error appears on the face of the record. Mary Refugio Jackson et al., A-27236 (February 29, 1956).

The Department recognizes the right of eligible Indians to select, enter, and appropriate public lands in accordance with the Indian Allotment Act. However, the selection right carries with it no right to a particular tract of land. Refusal to approve a particular application is neither to repudiate nor to destroy the Indian's right. That right continues to exist unimpaired and will be permitted to be satisfied when exercised with reference to land suitable for such settlement and disposition. Cf. G. A. Williams, A-25972 (December 27, 1950).

The decision of the Manager is, accordingly, affirmed.

Mrs. Stapp is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form-4-1365. If an appeal is taken the amount of the filing fee will be $5.00. In taking an appeal there must be strict compliance with the regulations.

For the Director:

G. H.

Enclosure

DISTRIBUTION:

Mrs. Ione H. Stapp (Certified Mail)
Lands Staff Officer
Appeals List No. 1
LLM

L (Sac)

DOCKET FILES

INDIAN ALLOTMENTS * 1 Generally

An Indian allotment application for nonirrigable grazing land which does not constitute an economic grazing unit is properly rejected.

Ione H. Stapp, Sacramento 052168 (January 22, 1960)

L O

appeal to Sec
set aside A-28705
8-28-61
68 ID

DOCKET FILES

INDIAN ALLOTMENTS * 1 Generally

A right to an Indian Allotment based upon a settlement on the land prior to the time of its having been withdrawn is not affected by the withdrawal.

Grover C. Sanderson, Sacramento 045861 (October 20, 1960)

In reply refer to:

Sacramento 045861
5.04g

October 20, 1960

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

Certified Mail
Return Receipt Requested

DECISION

Grover C. Sanderson	:	Indian Allotment
	:	
	:	

Application Allowed

On March 12, 1953, Grover C. Sanderson was issued an Indian Trust Patent to 20 acres of land in the Six Rivers National Forest. Subsequently, he applied to have patented to him 35 acres of adjoining land. The basis of his application was an alleged settlement on the land from childhood on.

In 1954, Mrs. Theodosia Caldwell, who was living on the land patented to Mr. Sanderson, claimed that he had not occupied the land in a manner entitling him to an allotment.

In a decision rendered on April 21, 1958 (Grover C. Sanderson, Sacramento 045861), which was affirmed by the Department (Theodosia F. Caldwell, A-27706 (December 16, 1958)), the Acting Director ordered a hearing to be held under the provisions of 43 CFR 221.6, to obtain evidence on the following issues of fact:

> With respect to the lands claimed by Mr. Sanderson,
>
> "(a) Was a settlement in good faith intiated on the land by Mr. Sanderson or his ancestors prior to the [Power Site] withdrawal of the land on April 13, 1912?
>
> "(b) If the settlement was initiated prior to the withdrawal of the land, what was the date of the settlement, and has the settlement been maintained?"

The significance of the answers to these questions is explained on page 8 of the Acting Director's decision:

> "If the settlement which is the basis of Mr. Sanderson's claim to this land under the Indian Allotment Act was initiated after April 13, 1912, when the land was withdrawn from entry and reserved as a power site, then as a matter of law the application for the 35 acres may not be allowed, and steps should be taken looking toward the cancellation of the trust patent already issued for the 20 acres.
>
> "If the settlement on the land preceded the power site withdrawal, but was subsequent to the inclusion of the land in the Klamath Forest Reserve, then the application may be allowed only upon the favorable classification of the land by the Secretary of Agriculture. If such settlement is established, the trust patent already issued pursuant to the favorable classification of the 20-acre tract would not, of course, be disturbed.
>
> "If the settlement preceded the withdrawal of 1905 creating the Klamath Forest Reserve, then the application for the 35-acre tract shall be allowed, and the trust patent already issued for the 20 acres shall remain undisturbed.
>
> "In examining the act of settlement and determining the intention and good faith of an Indian applicant, due and reasonable consideration should be given to the habits, customs, and nomadic instincts of the race, as well as to the character the land taken in allotment. 43 CFR 176.8."

The hearing was held in Hoopa, California, on June 6, 1959.

At the hearing, Mr. Sanderson testified that he was born on March 24, 1892 (Tr. 20), and that his stepmother had told him that he had been born on the land in question (Tr. 5). His mother died when he was about 3 years old, and he was raised by his aunt, Nellie Whitmore, a full-blooded Karuk Woman, whose Indian name was Nanottra (Tr. 5). The land on which Mr. Sanderson was born had been the site of an ancient Indian village, which, according to Mr. Sanderson, had been destroyed in 1847 or 1849, the Indians at that time fleeing to the mountains. Mrs. Whitmore lived on the land - which is sometimes called Rocky Point - in a house built by Grover's father (Tr. 10).

As a boy, Mr. Sanderson attended school at Orleans, and from 1910 to 1913 he attended the school at Hoopa (Tr. 13). He returned to the land in 1913, but subsequently left it again to go to work. Through the years he would return to the land - "visit it back and forth" (Tr. 15).

In 1921, he married, and brought his wife to the land. His children were raised there, and went to the school at Orleans (Tr. 27, 28).

Mr. Sanderson introduced into evidence several documents:

Exhibit A is an affidavit executed by Nancy Sanderson on May 16, 1958. She stated that she was 79 years old, and that she had known Grover since he was a baby. When Grover's mother died, the affiant married his father, Tony Sanderson. Grover lived most of the time with the Whitmores in a cabin on the land in question, only a short distance from the place where Grover's parents had lived.

Exhibit B is an affidavit executed on May 20, 1958, by Albert R. Wilder, who was then 83 years old. He stated that William and Nellie Whitmore had lived on the land known as Rocky Point, having inherited it from their ancestors.

Exhibit C is an affidavit signed on May 17, 1958, by Elsie P. Young. She stated that she was 90 years old, that Nellie and William Whitmore had inherited Rocky Point from their ancestors, and that Grover Sanderson "was the only one they had and claimed as theirs."

Exhibit D is a statement by William Aiken that he had visited the Grover Sanderson home near Orleans in September, 1937.

Exhibit E is an affidavit executed on May 23, 1958, by David W. Risling, who stated that he was born July 12, 1887; that he had known Grover Sanderson since he was a small boy, and that Grover's only home then had been with William and Nellie Whitmore, at Rocky Point, this being the site of an old Indian village.

Exhibit F is a map of Rocky Point, which purports to have been prepared in July, 1941, in connection with an application for a right to divert water from nearby Whitmore Creek.

Exhibit G is a statement by George Quinn that he had seen on the land in question - apparently on June 15, 1959 - a reservoir about 30 feet wide and 50 feet long, and a ditch and a flume leading to Grover Sanderson's house. He had also seen an old Indian trail to a spring, and to an ancient Indian village, where there were three holes in the ground indicating the former locations of Indian houses.

Exhibit H is a deed purporting to have been executed on May 17, 1904, whereby William Whitmore conveyed to Nellie Whitmore a possessory right to a placer mine located on the lands claimed by Mr. Sanderson.

Exhibit I is a Quitclaim Deed whereby Nellie Whitmore conveyed to Grover Sanderson what was apparently the same property conveyed to her by Exhibit H.

Exhibit J is a document entitled "Declaration of Homestead," recorded in the Humboldt County records on August 26, 1936. It is a statement by Mr. Sanderson that he was then residing on certain lands, the legal descriptions of which coincide with the lands embraced both in Mr. Sanderson's Trust Patent, and his Indian Allotment application.

The second witness at the hearing, Nancy Sanderson, Grover's stepmother, testified that Grover had been born on the land (Tr. 17). His mother, Mollie Sanderson, died which he was two or three years old, and he went to live for a little while with his grandmother, Edmifan, or Mary (Tr. 18). Afterwards, and while he was still little, he went to live with Nellie Whitmore (Tr. 19). When he was older, he would sometimes live with Nellie Whitmore, and sometimes with the witness (Tr. 19). Mr. Sanderson was on the land claimed by him both before 1913, and before 1905(Tr. 21).

The next witness, David Risling, testified that he was born in 1887, and that he was a companion of Grover's childhood (Tr. 22). The witness spoke no English until he was 7, and knew Grover by the name of Pepsha (Tr. 24). Grover's permanent home then was with the Whitmores, with whom he lived while he attended school in Orleans (Tr. 23, 24). This was prior to 1905, the witness having gone to Chemawa, Oregon, in 1906 (Tr. 24, 26).

The last witness to testify was Dillon A. Longenbaugh, an employee of the Bureau of Indian Affairs, who was called by and on behalf of the government. Mr. Longenbaugh stated that he did not have any personal knowledge of the matters considered at the hearing, but he believed the testimony of the witnesses to be correct (Tr. 30).

According to Mr. Longenbaugh, the Indians in the area used to live in villages located in accessible places along the Klamath River. They depended upon fish, acorns, herbs and fruits for their livelihood, and used to travel up and down the river in canoes cut out of big redwood trees (Tr. 30). Subsequently, along the river, there was a great deal of gold mining activity; white miners took over the area, sometimes, as in the case of Mr. Sanderson's grandfather, intermarrying with the Indians, sometimes expelling them (Tr. 31).

From the foregoing testimony and exhibits, it is found that Mr. Sanderson has lived on the land, intermittently, and at irregular intervals, since his birth in 1892, and that, considering the customs, habits, and nomadic instincts of the race, his occupation of the land is adequate to entitle him to an allotment to the land, which land, by virtue of Mr. Sanderson's settlement thereon, was not affected by the 1905 proclamation creating the Klamath Forest Reserve (now known as the Six Rivers National Forest), or by any subsequent withdrawal.

It is therefore concluded that there exist no grounds for recommending the cancellation of the Indian Trust Patent issued to Mr. Sanderson on March 12, 1953, for the 20 acres at that time found suitable for allotment, and that the application filed on February 15, 1954, for the adjoining 35 acre tract may be allowed. When the decision becomes final, the case will be remanded to the Sacramento Land Office for further action consistent with this decision.

The General Counsel of the United States Department of Agriculture is allowed the right of appeal to the Secretary of the Interior, in accordance with the regulations in 43 CFR Part 221, a copy of which is enclosed. (Form 4-1365). If an appeal is taken the adverse party to be served is Mr. Grover C. Sanderson, Apartment 7, k876 15th Street, San Francisco, California.

Edward Woozley
Director

DISTRIBUTION:
Mr. Jesse R. Farr, Office of the General Counsel, USDA (Certified Mail)
Grover C. Sanderson (Regular Mail)
Mrs. Theodosia F. Caldwell (Regular Mail)
Edwin J. Regan, Attorney at Law (Regular Mail)
Mr. Dillon A. Longenbaugh, Acting Supervisory Field Representative (Regular Mail
Mr. Arthur A. Lusher (Regular Mail)
Mr. John Sieker, Forest Service, USDA (8)
Bureau of Indian Affairs , Washington, D. C.
Mr. Elmer F. Graham, Hearings Administrative Officer
Lands Staff Officer
Appeals List No. 1
MG

[illegible]

[illegible]

DECISION

[illegible] : [illegible]

[illegible]

[illegible]

[illegible]

Trust patent No. [illegible]

Trust patent No. [illegible]

[illegible]

[illegible]

[illegible]

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054321

Hillman
1/10/61
nichols 1/11/61
McCalling 1/12/61

Certified Mail

JAN 1 3 1961

DECISION

Edward Elmer Mitchell, Jr. : Public Domain Indian Allotments
:
Irene Mitchell Pallin :

Petition Denied

On July 5, 1960, 25-year patents were issued pursuant to Section 4 of the act of February 8, 1887 (24 Stat. 388, 389) to two Indians of the Yurok Indian Tribe, as follows:

> Trust patent No. 1210575 to Edward Elmer Mitchell, Jr., for the E½SW¼ sec. 29 T. 10 N., R. 4 E., Humboldt Meridian, California, containing 80.00 acres;
>
> Trust patent No. 1210576 to Irene Mitchell Pallin for the S½SE¼ sec. 29, T. 10 N., R. 4 E., Humboldt Meridian, California, containing 80.00 acres.

On December 19, 1960, this office received by reference from the Bureau of Indian Affairs a letter of October 14, 1960, from Mr. Edwin J. Regan, attorney for Irene Mitchell Pallin. This letter, with a prior letter of August 26, 1960, from Mr. Regan, are treated as petitions to cancel the above-described patents, and to effect a different division of the lands between the trust patentees. Mr. Regan also asked that the patents be not delivered.

Delivery of the patents is not essential to vesting of title in the patentees for the land described in the patents (1 L.D. 18, 22, 90; 2 L.D. 386; 4 L.D. 345, 500; 8 L.D. 70). Accordingly, the withholding of delivery of the patents would have no effect on the vesting of the trust titles in the patentees. Issuance and recording of the patents on the records of this office has vested title to the lands described therein in the patentees.

The act of June 26, 1895 (28 Stat. 641), as amended by the act of April 23, 1904 (33 Stat. 297; 25 U.S.C. 343) affords no basis for the cancellation of the patents without authority of Congress.

In view thereof, the petition is denied. The petitioner has the right of appeal to the Secretary of the Interior, in accordance with the regulations in 43 CFR, Part 221, as amended. See Form 4-1365, attached. If an appeal is taken, the filing fee will be $5. In taking an appeal, there must be strict compliance with the regulations. Since Edward Elmer Mitchell, Jr., is the adverse party hereto, service must be had on him in accordance with 43 CFR 221.34.

For the Director:

S C Nichols

Attachment

LSHillman:mc 1/10/61

Copy to: FS Reading File
Permanent File
State Supervisor, Sacramento, California (2)
Bureau of Indian Affairs, Washington, D. C.

appeal to Sec
affirmed in part. A-28829 - 9-17-62

DOCKET FILES

INDIAN ALLOTMENTS * 1 Generally

Since the publication of the general withdrawals of November 26, 1934, and February 5, 1935, (Executive Orders 6910 and 6964) no public land may be settled under Section 4 of the General Allotment Act of February 8, 1887, until the land has been favorably classified for such settlement by the Secretary of the Interior or his delegate.

Section 4 of the General Allotment Act contemplates that allotments will be made only to living persons, and an allotment based upon settlement prior to 1934 or 1935 will be confirmed to the heirs of the allottee only where the Indian dies after filing the application.

The rights of Indians settling on the public domain prior to 1934 or 1935 stem from the act of settlement. Although Section 4 of the General Allotment act does not expressly specify what constitutes settlement under that act, the act is, in its essential elements, a settlment law and "settlement" thereunder must be construed to mean practically the same it does under the homestead law, where the essential requirement is actual inhabitancy of the land to the exclusion of a home elsewhere. A reasonable regard to the habits, dispositions and nomadic character of the race permits more leniency in applying and enforcing this rule, but does not justify its complete disregard.

From the time of the general withdrawals of 1934 and 1935, lands primarily valuable for timber have not been subject to disposition under Section 4 of the General Allotment Act.

John David Smith et al., Sacramento 053347, etc. (February 6, 1961)

In reply refer to:
Sacramento 053347, etc.
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

February 6, 1961

Certified Mail
Return Receipt Requested

DECISION

John David Smith et al. : Indian Allotment

Decision Affirmed

Mr. John David Smith and two others 1/ have appealed from a decision of the Manager, dated October 12, 1959, rejecting their applications filed under Section 4 of the General Indian Allotment Act of February 8, 1887 (24 Stat. 388; 25 U.S.C. 334 *et seq.*), as amended. The decision recites that the lands are not suitable for grazing because of the lack of forage resources, and would not constitute an economic grazing unit even if the three allotments were to be combined to form one operating unit, and that the lands have no agricultural value, but are valuable for the timber resources found thereon.

The appellants' applications, filed on January 25, 1957, were initially rejected by the Manager on April 23, 1957, for the reason that the NE¼SE¼ of section 4 had been withdrawn from entry on May 13, 1927 for Power Project No. 179, and on January 3, 1928, all of the land applied for was withdrawn for Power Project No. 864. These withdrawals were effected under the provisions of Section 24 of the Act of June 10, 1920. (41 Stat. 1075; 16 U.S.C. 818). 2/

1/ The appellants, their respective application number, and the lands in section 4, T. 20 N., R. 6 E., M.D.M., described in their applications are:

John David Smith	Sacramento 053347	NW¼
Charles E. Smith	Sacramento 053348	N½SW¼, NW¼SE¼, SE¼SW¼
Elmer Smith	Sacramento 053349	W½NE¼, SE¼NE¼, NE¼SE¼

2/ Power Projects 249 and 864, pertaining to Lots 1, 2, 3, 4, S½SE¼, S½NW¼, SW¼, section 4, T. 20 N., R. 6 E., M.D.M., were vacated by FPC order, DA-926 issued June 21, 1957, and the lands were restored to entry by Public Land Order 1989 dated September 23, 1959.

Elmer Smith alone appealed from the Manager's decision of April 23, 1957. His appeal was founded on an assertion that "the Smith family have occupied and used this land since before 1918." This assertion prompted the Director to remand the case for an investigation of the settlement claim, Elmer Smith, Sacramento 053349 (May 21, 1958). The applications of John David and Charles E. Smith were reinstated in order that the settlement claims could be considered together.

An extensive investigation of the claims was conducted and, from the evidence adduced, the Manager concluded that the appellants had not made a valid settlement on the land and rejected the applications for the reasons outlined above.

Since the publication of the general withdrawals of November 26, 1934, and February 5, 1935 (Executive Orders 6910 and 6964), no public land may be settled under Section 4 of the General Allotment Act, supra, until the land has been favorably classified for such settlement by the Secretary of the Interior or his delegate. See 43 CFR 176.1, footnote 1; 43 CFR 296. An unauthorized settlement of the lands after this time would not entitle the settler to an Indian allotment. Dewey Mose, A-26489 (November 18, 1952). Consequently, unless the appellants have shown that they have a claim to the lands applied for which antedates the general withdrawals of 1934 and 1935, their alleged use and occupancy of the lands since that time confers no rights upon them and would be immaterial to the classification of the land.

Section 4 of the General Allotment Act, supra, reads in part as follows:

> "That where any Indian entitled to allotment under existing laws shall make settlement upon any surveyed or unsurveyed lands of the United States not otherwise appropriated, he or she shall be entitled, upon application to the local land office for the district in which the lands are located, to have the same allotted to him or her ***." (Emphasis supplied)

In other words, Indians otherwise entitled to allotment under Section 4, who have made settlement on the public domain are entitled to have the same allotted to them only "upon application to the local land office." Thus, Section 4 contemplates that allotments will be made only to living persons who apply for them. An allotment will be confirmed to the heirs of the allottee only where the Indian dies after settlement and filing of the application. 43 CFR 176.6; 52 L.D. 383, 385 (1928).

Accordingly, assuming that the ancestors of the appellants did settle upon the land as the appellants allege, this fact, if established, would confer no rights on the appellants as no allotment applications were filed by the appellants' deceased ancestors. The appellants must prove that their own settlement predates the withdrawals of 1934 and 1935.

Section 4 of the General Allotment Act does not expressly specify what constitutes settlement under that act and the Department's regulations, 43 CFR 176.8, provide only broad criteria for determining this. Nevertheless, the rights of Indians settling on the public domain stem from the act of settlement. This rule, made in the early days of the administration of the Act, has been consistently followed by the Department. Solicitor's Opinion, 57 I.D. 547, 549 (1942). On September 18, 1887, the Department issued a circular containing rules and regulations which required the Indian applying for an allotment under Section 4 to make an oath that, among other things, he had made actual bona fide settlement upon the lands he desired to have allotted to him. Indian Lands - Allotments, 8 L.D. 647, 649 (1889). And, in the Secretary's Instructions of February 21, 1903, 32 L.D. 17 (1903), it was stated:

> "[I]t must be remembered that settlement, by the very terms of the act, is a prerequisite to allotment under section 4 of the act of February 8, 1887. It is held that said act is, in its essential elements, a settlement law; * * * 'settlement' therein, must inevitably be construed to mean practically the same it does under the homestead law, where the essential requirement is actual inhabitancy of the land to the exclusion of a home elsewhere. * * * [P]roper and reasonable regard to the habits, dispositions and nomadic character of the race * * * [permit] more leniency in applying and enforcing the rule * * *".

Granting that this rule should be applied with leniency, it does not follow that it should be completely ignored in considering the settlement claims of Indians applying for allotments under Section 4 of the General Allotment Act. With this in mind, an examination of the record discloses no facts indicating that the appellants themselves settled on the land prior to 1934.

The appellants, who reside in the city of Oroville, California, have alleged in essence that the "Smith family" has used the lands for grazing since before 1918; that Hood Smith, father of Elmer Smith and grandfather of John David and Charles E. Smith began settlement on the lands about 1910; and that two brothers of Elmer Smith "lived on the land part of the time." They have made no assertion that they have individually settled on the land at any time.

Furthermore, the record shows that Andy Smith, brother of Elmer Smith, lived on the $W\frac{1}{2}$ and $SE\frac{1}{4}$ of section 4 from 1928 until his death in 1948; that in 1944 he had been grazing the land for 25 years and at that time was issued together with John Johnson, a grazing lease for the period 1945-1955. The land has been under a grazing lease issued to John Johnson alone since 1955.

Thus, there is nothing of record operating to except, for the benefit of the appellants, the lands in question from the effect of the general withdrawals of 1934 and 1935. This being the case, the lands are not subject to disposition under Section 4 of the General Allotment Act unless and until properly classified for such disposition.

It has been established that the lands applied for are highly valuable for the timber resources thereon. The rule that an application for an allotment of lands upon which settlement has been made in good faith cannot be denied on the grounds that the lands are too poor in quality, or contain valuable timber, is not applicable in cases where no settlement has been established prior to the general withdrawals of 1934 and 1935. Since that time, lands primarily valuable for timber have been declared to be not suitable for disposition under section 4 of the General Allotment Act, Edward H. Metcalf, A-23961 (December 11, 1944). The appellants' applications must be rejected for this reason alone.

The Department recognizes the right of eligible Indians to select public lands in accordance with the General Allotment Act. However, the selection right carries with it no right to a particular tract of land. Refusal to approve a particular application is neither to repudiate nor to destroy the Indian's right. That right continues to exist unimpaired and will be permitted to be satisfied when exercised with reference to land suitable for such settlement and disposition.

Accordingly, the decision of the Manager is affirmed. **Alexander Bateman et al., A-27203 (November 9, 1955).**
The appellants are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken the amount of the filing fee will be computed on the basis of $5 for each application included in the appeal. If the appeal covers all applications adversely affected by this decision the total filing fee is $15.00. In taking an appeal there must be strict compliance with the regulations.

Enclosure

For the **Director**

DISTRIBUTION:

Hon. Harold T. Johnson, House of Representatives
Mr. John David Smith (Certified Mail)
Mr. Charles E. Smith (Certified Mail)
Mr. Elmer Smith (Certified Mail)
Lands Staff Officer
Appeals List No. 1
LLM

Please return to File
1 cy only read.

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GAC
PM
MB

In reply refer to:
Sacramento 053580
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

February 21, 1961

Certified Mail
Return Receipt Requested

DECISION

May L. Freeman : Indian Allotment
:
:

Decision Affirmed

Mrs. May L. Freeman has appealed from the decision of the Acting Manager dated January 6, 1960, which rejected her application for an Indian allotment for certain lands which are included within the Six Rivers National Forest for the reason that she did not occupy, live on, or have improvements on the land applied for, as required by Sec. 31 of the Act of June 25, 1910 (36 Stat. 863; 25 U.S.C., 1958 ed., sec. 337). This will hereafter be referred to as "the Act". The Act reads as follows:

> "The Secretary of the Interior is authorized, in his discretion, to make allotments within the national forests in conformity with the general allotment laws, to any Indian occupying, living on, or having improvements on land included within any such national forest who is not entitled to an allotment on any existing Indian reservation, or for whose tribe no reservation has been provided, or whose reservation was not sufficient to afford an allotment to each member thereof. All applications for allotments under the provisions of this section shall be submitted to the Secretary of Agriculture who shall determine whether the lands applied for are more valuable for agricultural or grazing purposes than for the timber found thereon; and if it be found that the lands applied for are more valuable for agricultural or grazing purposes, then the Secretary of the Interior shall cause allotment to be made as herein provided."

The regulations promulgated pursuant to the Act provide that the Indian allotment application must be approved by the Commissioner of Indian Affairs, and that the Secretary of Agriculture must determine that the land applied for is more valuable for agriculture or grazing than for timber before any affirmative action thereon can be taken by this Bureau. 43 CFR 176.15. The afore cited regulation also provides that the application should be submitted

DOCKET FILES

gac
mjf

Appeal to Sec -affirmed- Mgr's PM Decision

DEPT. OF INTERIOR
SACRAMENTO, CAL.

DEC 8 1 17 PM 1961

BUREAU OF
LAND MANAGEMENT
LAND OFFICE

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

In reply refer to: A-29404
6.05c LA 062888 2-24-64
Sacramento 052523, etc. 1/

Certified Mail
Return Receipt Requested

DECISION

November 28, 1961

Harry W. James et al. 1/ : Public Sale Applications
: Indian Allotment Application

Manager's Decision Affirmed

Mr. Harry W. James and the five other parties listed in the attached appendix have appealed from the Manager's decision of Febraury 28, 1961, which rejected their various applications for public lands which are located within this Bureau's "Humboldt, Del Norte, Mendocino, Trinity County Public Land Management Area". 1/ The reasons stated for the rejections are that it is in the public interest to retain the lands in Federal ownership as they are valuable for administration for balanced uses including watershed management, timber management, wildlife conservation, public recreation, and livestock grazing; and that the lands may be used or selected as base in state indemnity selections or exchanges or in scrip applications.

The appellants contend primarily that they should be entitled to acquire the lands involved for reasons relating to their own needs and uses, such as for enlarging ranch and stockwater lands, for acquiring the timber to carry on a lumber business, and for raising fruit and walnut trees and building a home. Several appellants claim that the particular tract they desire is surrounded by private lands and has no public access and that public use of such land is not feasible and/or that conservation of the natural resources and wildlife can be and is carried out by private parties. The Witters and Mrs. Gillette indicate that they initiated action with the Federal Power Commission which led to the restoration of the lands involved for entry. This action, however, did not give them any preference right of entry or assurance that the land would be classified for disposal. Cf. Alma Everett Morris, Jr., et al., A-27235 (December 12, 1955).

1/ The names of the appellants and the serial number of their respective applications are listed in the appendix. The applications are all for the public sale of the lands except that of Dorothy Darlene Brown Anderson (Sacramento 062888) which is for an Indian Allotment.

Classification of these lands for public sale or for an Indian allotment by the Secretary or his representatives pursuant to Section 7 of the Taylor Grazing Act (43 U.S.C., 1958 ed., sec. 315f) is discretionary. The Secretary announced on February 14, 1961, in his Public Land Conservation Program that classification of lands for disposal under the public land laws must meet the test of serving the public interest. The Manager's decision outlined the reasons for retaining the lands in public ownership. These reasons are more compelling than those offered by the appellants for disposal of the lands. It is determined that the public interest can best be served at this time by retaining the lands in Federal ownership to be managed for the uses stated in the Manager's decision and for future use or exchange in the implementation of public land and recreation programs of this Department.

Accordingly, as the appellants have failed to show by any positive or substantial evidence that it is in the public interest to classify the particular lands involved for public sale or for acquisition as an Indian allotment, the Manager's decision is affirmed. Cf. Garfield Taylor, A-28205 (April 26, 1960); Roscoe T. Schafer, A-28131 (August 27, 1959); Randall Storey, A-27573 (September 22, 1958); Lillian Shermoen, A-28119 (January 15, 1960).

Each appellant listed on the appendix is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken the amount of the filing fee will be $5.00. In taking an appeal there must be strict compliance with the regulations.

Richard J McCormick
Legal Assistant
Division of Appeals

Enclosure

DISTRIBUTION:

Each appellant listed in the Appendix (Certified Mail)
Gilmore & Gilmore, Attorneys for the Witters and Mrs. Gillette (Certified Mail)
Chief, Division of Lands & Recreation
SD (California)
LO (Sacramento)
Case File
Perm. File
Attorneys' Reading File
Appeals Reading File
JBT

APPENDIX

Appellant	Sacramento Serial Number
Mr. Harry W. James P. O. Box 613 Garberville, California	P.S. 052523
McIntosh Lumber Company Blue Lake, California	P.S. 052948
Mr. John J. Hansen RFD Box 604 Fortuna, California	P.S. 052975
Mrs. Ester M. Snethen 8214 Chantry Street Fontana, California	P.S 059340
Mr. Dean Witter, Jr., Mr. William D. Witter & Mrs. Ann W. Gillette by Edmond S. Gillette, Jr. c/o Gilmore & Gilmore Attorneys at Law 301 Crocker-Anglo Bank Building Sacramento 14, California	P.S 053691
Mrs. Dorothy Darlene Brown Anderson Star Route Carlotta, California	8.0 I.a. 062888

045259

appeal to Sec

Affirmed
A-29342
7-17-63

20

In reply refer to:
6.05c
Sacramento 054082
054083

DOCKET FILES

DEPT. OF INTERIOR
SACRAMENTO, CAL.

DEC 18 10 00 AM 1961

BUREAU OF
LAND MANAGEMENT
LAND OFFICE

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

December 8, 1961

Certified Mail
Return Receipt Requested

DECISION

Rollandine Ruth Landergen Rolland D. Landergen	:	Indian Allotment Applications

Decision Affirmed

Mr. Rolland D. Landergen, on behalf of his minor daughter, Rollandine Ruth Landergen, and himself, has appealed from the Manager's decision, dated January 4, 1961, which rejected their respective Indian Allotment applications filed on May 31, 1957 for the NW¼ and the SW¼ Sec. 24, T. 3 S., R. 1 W., H.M., California. The applications were rejected for the reason that proper settlement had not been made upon the land as asserted by Mr. Landergen.

In his notice of appeal, the appellant states that, prior to receipt of the decision appealed from, the Bureau examiner informed him that a logger in the vicinity had shown him the property. The appellant asserts that the logger had misrepresented pertinent information regarding his early settlement claim to the land, and he requested an opportunity to review the facts with the examiner and show him the area embraced in his claim. In a subsequent interview with the examiner, the appellant admitted that the only additional evidence of settlement he could show was the location of an old cabin that had been washed away by the 1955 flood. It was mutually agreed that re-examination of the property was not necessary, and the appellant agreed to restate his claim. By letter, dated February 18, 1961, the appellant alleged settlement on the land through his father since 1894, and he asserted in substance that the cabins built on the land and which were lived in while hunting and fishing were destroyed by fire on separate occasions; that the remains of the old cabins, a shed and fruit trees were destroyed by the 1955 flood. He contends that the claim to the land was not disputed and that permission of the family was asked by anyone who wished to use the land.

The appellant's self-serving statements are unsupported and insufficient to show that the decision appealed from is erroneous. *Mary Refugio Jackson et al.*, A-27326 etc. (February 29, 1956).

The appellant's claim to the SW¼ Sec. 24 for his daughter, Rollandine R. Landergen, is based upon his alleged settlement on the NW¼ Sec. 24.

Since the appellant has not made actual settlement on the land he applied for, the application for his minor daughter was properly rejected as not appropriate (43 CFR 1954 ed., 176.12).

Accordingly, the decision appealed from is affirmed.

Each appellant is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken the amount of the filing fee will be $5 for each application upon which favorable action is sought. In taking an appeal there must be strict compliance with the regulations.

Richard J. McCormick
Legal Assistant
Division of Appeals

Enclosure

DISTRIBUTION:

Rolland D. Landergen (Certified Mail)
Rollandine Ruth Landergen (Certified Mail)
SD (California)
LO (Sacramento) ✓
Division of Lands & Recreation
Case Files
Perm. File
Appeals Reading File
Attorneys' Reading File
RLE

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DEC 18 1961
BUR. OF LAND MGMT.
STATE OFFICE
SACRAMENTO, CALIF.

I.D. - [illegible]

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
WASHINGTON 25, D. C.

In reply refer to:
[illegible]
Sacramento [illegible]

[illegible]

February [illegible], 1962

DECISION

[illegible] C. [illegible]
Theodosia F. Caldwell : Indian allottee
Forest Service, United States
Department of Agriculture

Indian allotment [illegible] cancellation of Indian
Trust Patent not recommended

Pursuant to Departmental decision [illegible] of August [illegible], 1961, a supplemental hearing was had on December 5, 1961, before Hearing Examiner [illegible], to afford Mrs. Theodosia F. Caldwell, and other interested parties, the opportunity to present evidence on the following issues of fact with respect to lands claimed by the above-named Indian allottee: 1/

(a) Was a settlement in good faith initiated on the land by Mr. [illegible] or his ancestors prior to the withdrawal of the land on April [illegible], 19[illegible]?

(b) If the settlement was initiated prior to the withdrawal of the land, what was the date of the settlement, and has the settlement been continuous?

[illegible] C. [illegible] appeared at the hearing and he was represented by [illegible], Attorney at Law. [illegible] appeared as a witness in his behalf. Mrs. Theodosia F. Caldwell was present at the hearing but did not testify. She was represented by [illegible], Attorney at Law, who presented the following witnesses: [illegible], William [illegible], [illegible], [illegible], and [illegible].

A summary of the testimony of the witnesses and of the exhibits accepted at the hearing follows:

1/ The Director's decision of [illegible] held that the trust patent previously issued to Mr. [illegible] for 80 acres on March [illegible], 19[illegible], should not be recommended for cancellation and that the application of February [illegible], 19[illegible], for patent to 80 acres of adjoining land should be allowed.

LO - Sacramento

DEPT. OF INTERIOR
SACRAMENTO, CAL.
MAR 12 10 09 AM 1962
BUREAU OF
LAND MANAGEMENT
LAND OFFICE

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

In reply refer to:
6.05c
Sacramento 045861

February 12, 1962

DECISION

Grover C. Sanderson :
Theodosia F. Caldwell : Indian Allotment
Forest Service, United States :
Department of Agriculture :

Indian allotment allowed; cancellation of Indian Trust Patent not recommended.

Pursuant to Departmental decision A-28705 of August 28, 1961, a supplemental hearing was had on December 5, 1961, before Hearing Examiner John A. Wood, to afford Mrs. Theodosia F. Caldwell, and other interested parties, the opportunity to present evidence on the following issues of fact with respect to lands claimed by the above-named Indian allottee: [1]

(a) Was a settlement in good faith initiated on the land by Mr. Sanderson or his ancestors prior to the withdrawal of the land on April 13, 1912?

(b) If the settlement was initiated prior to the withdrawal of the land, what was the date of the settlement, and has the settlement been maintained?

Grover C. Sanderson appeared at the hearing and he was represented by Walter M. Gleason, Attorney at Law. David Risling appeared as a witness in his behalf. Mrs. Theodosia F. Caldwell was present at the hearing but did not testify. She was represented by Donald R. Kennedy, Attorney at Law, who presented the following witnesses: Lawrence M. Knudsen, William Reece, Jasper Reece, Stella McLaughlin Howerton, and Charles McLaughlin.

A summary of the testimony of the witnesses and of the exhibits presented at the hearing follows:

---

[1] The Director's decision of October 20, 1960, held that an Indian Trust Patent previously issued to Mr. Sanderson for 20 acres on March 12, 1953, should not be recommended for cancellation and that his application of February 15, 1954, for patent to 35 acres of adjoining lands should be allowed.

LAWRENCE M. KNUDSEN testified that he was born in 1894 near the lands here in question, but that he left the area when he was 14 years of age and did not return again until two years ago. He testified that he went to school with Grover Sanderson and he resided at Camp Creek at that time but does not know where Grover Sanderson lived. Mr. Knudsen testified that he does not know who Grover Sanderson's parents were.

WILLIAM REECE testified in substance that he was born in 1888 about 3 miles above Orleans where he presently lives. He testified that he has known Grover Sanderson all his life. He testified that he went to school with Grover Sanderson and that Grover lived at Camp Creek at that time. He testified that to his knowledge there was one small cabin and that the first he knew of anyone living there was Mr. Whitmore about 1914. On cross-examination Mr. Reece was shown Exhibits 3-C and 3-D which are photographs of Mr. Sanderson and his family taken upon the Rocky Point property. Mr. Reece recognized the photographs and testified that Sanderson brought up his family a little while on the property. Mr. Reece testified that he did not visit the Sanderson family while they were living on the property. He was shown additional photographs marked Exhibits 3-B and 3-D showing pictures of Nellie Whitmore and cabins on the described property, whereupon Mr. Reece testified that he did not recognize them and that he can't see very good anyway. He testified that Tony Sanderson, Grover's father, built a cabin on the property about 1914. He testified on re-direct examination that Mr. Sanderson's family lived in the cabin sometime after 1914.

JASPER REECE, brother of William Reece, testified in substance that he was born on the Reece homestead in 1897 and that after living there approximately 19 years he left and moved to Eureka. He testified that he went to school with Grover Sanderson in approximately 1906. He testified that he never visited Grover Sanderson at his home. He testified that during his school years Grover came to school from down river and lived down at Camp Creek. He testified that he does not know of his own knowledge if Grover Sanderson ever resided on the Rocky Point property. He testified that the one cabin on the Rocky Point property was built in 1915 and that the Whitmores lived there. Mr. Reece testified that he never saw Grover Sanderson around the property (note Mr. Reece's testimony that he left the area in 1915 or 1916 and did not return until 1950). Mr. Reece testified that he knows Grover Sanderson stayed at the Reece property around 1909 or 1910. On questions from the Examiner, Mr. Reece admitted that the Reeces and Whitmores were partners in a mining venture and that the original mining venture included both the Reece property and the Rocky Point mine, which was later divided between Mr. Reece and Mr. Whitmore. Mr. Reece testified that he was a small boy when the division was made. He testified that he was approached some time last week by Mr. Close who asked him to be a witness in this case.

He testified on cross-examination that he does not know when the mining operation terminated, but he does know that Mr. Whitmore lived on the Rocky Point property for many years with Nellie Whitmore. Mr. Reece testified that Grover Sanderson might have lived on the property but he didn't know about it.

NOTE: The witnesses' testimony that they went to school with Grover Sanderson can only be interpreted as attending the same school. They did not associate with Grover Sanderson, as admitted in their testimony.

STELLA McLAUGHLIN HOWERTON testified in substance that she was born in approximately 1905 and that they moved to Orleans in 1911 at a point about a half mile south of the Rocky Point property. She testified that she does not know Grover Sanderson, that the first time she saw Grover Sanderson was in 19[illegible] at a show in the Orleans schoolhouse. Mrs. Howerton testified that they lived on the property from 1911 to 1920 (the witness at that time was from 6 to 15 years of age). Mrs. Howerton testified that from 1911 to 1920 Billy and Nellie Whitmore lived on the property.

CHARLES McLAUGHLIN, brother of Stella McLaughlin Howerton, testified in substance that he was in the Orleans area from 1911 to about 1917. He testified that he did not know Grover Sanderson but that he knew of him. He testified that he never saw Grover Sanderson on the Rocky Point property at all. He testified that he helped Billy and Nellie Whitmore move the house down from the Reece ranch to the position it now occupies in about 1914 or 1915. He testified that he ran around the area when he was 17 and 18 years old and that he left the area for good in 1923. He testified that he visited Nellie and Billy Whitmore on the Rocky Point Property after he moved away and that he never saw Grover Sanderson living there. On cross-examination he testified that he could not remember what years nor how many times he visited Nellie Whitmore on the Rocky Point property. He testified on cross-examination that he remembers an old shake cabin higher up on the property. After this testimony, Mr. Kennedy offered into evidence four affidavits, Exhibits 4-A through 4-D.

The first affidavit, Exhibit 4-A, was executed by Marion Lowsley, proprietor of the Orleans Hotel which she acquired in the year 1919. The affidavit merely recites happenings during the married years of Grover Sanderson until the death of Nellie Whitmore about 1939.

Exhibit 4-B is an affidavit executed by Hazel Roff, sister of Stella Howerton and Charles McLaughlin, who previously testified. This affidavit recites that Mrs. Elsie McLaughlin, mother of the previous witnesses and herself, was a friend of Nellie Whitmore and was closely associated with her until her death. The affidavit recites that she never saw Grover Sanderson until 1933. The affidavit further recites that Grover Sanderson and his family moved on the Rocky Point property about 1936 and his children attended the Orleans school.

Exhibit 4-C, an affidavit executed by Lottie McLaughlin Beck, recites that she is 51 years of age (born in 1910) and that she resided near the Rocky Point property and is presently acquainted with Grover Sanderson. It further recites that Nellie Whitmore lived with William Whitmore below Orleans not far from what is known as the Tom Lockwood property and later moved to the Reece Ranch above the Rocky Point property. The affidavit further recites that she never knew Grover Sanderson until he came to Orleans in 1921. The affidavit further recites that she was a witness to the quitclaim deed from Nellie Whitmore to Grover Sanderson (the recorded deed Exhibit I speaks for itself and was witnessed by Irby E. Hosea and Jennie MacKinnon). The affidavit further recites that Nellie Whitmore was taken to Hoopa Indian Reservation where she stayed until her death. The affidavit further recites allegations not material to the issue.

Exhibit 4-D, is an affidavit executed by E. F. Wilder, brother of Albert R. Wilder who executed the affidavit marked Exhibit B. The affidavit recites that he is one of the locators of the Rocky Point mine together with Frank Reece and William Whitmore according to the location notice of 1908. The affidavit further recites that prior to 1908 the Rocky Point mine was being operated by William Whitmore.

From the foregoing it is concluded that the testimony and affidavits received at the supplemental hearing in support of Mrs. Caldwell's assertions are insufficient and inconclusive to refute the claims as to use and occupancy of the land by Grover Sanderson and his ancestors and the evidence previously submitted that Nellie Whitmore stood in loco parentis to Grover Sanderson.

The additional testimony and exhibits offered and received at the supplemental hearing in behalf of Grover Sanderson, together with the previous affidavits and testimony in his behalf at the hearing in this matter on April 21, 1958, support the findings of fact and the conclusions heretofore made in the Bureau decision of October 20, 1960, namely, that the use and occupancy of the land by Mr. Sanderson and his ancestors (since Mr. Sanderson's birth in 1892) are adequate to entitle Mr. Sanderson to an allotment of the land in question and, consequently, that there exist no grounds for recommending cancellation of the Indian Trust Patent issued to Grover Sanderson on March 12, 1953, for the 20 acres at that time found suitable for allotment, and that the application filed on February 15, 1954, for the additional 35 acres may be allowed. Accordingly, it is so held. Further, the use and occupancy of the land and the reasonable maintenance thereof by Grover Sanderson and his ancestors having been initiated prior to the creation of the Klamath Forest Reserve (May 6, 1905), Grover Sanderson's request for allotment is properly considered under section 4 of the General Allotment Act of February 8, 1887 (25 U.S.C. sec. 334).

Accordingly, the case is being remanded to the Sacramento Land Office for further action consistent with this decision.

Karl S. Landstrom
Director

Approved: February 27, 1962

John A. Carver, Jr
Assistant Secretary of the Interior

DISTRIBUTION:

Mr. Charles F. Lawrence (Regular Mail)
Mr. Walter M. Gleason, Attorney for Sanderson (Regular Mail)
Mr. Grover C. Sanderson (Regular Mail)
Mr. Donald R. Kennedy, Attorney for Caldwell (Regular Mail)
Mrs. Theodosia F. Caldwell (Regular Mail)
Area Director, Bureau of Indian Affairs (Regular Mail)
Field Representative, Bureau of Indian Affairs (Regular Mail)
Office of Hearing Examiners, Sacramento (Regular Mail)
SD (California)
LO (Sacramento)
Chief, Division of Lands & Recreation
Case File
Perm. File
Attorneys' Reading File
Appeals Reading File
FP

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

In reply refer to:
6.05c
Sacramento 064654

April 4, 1962

DOCKET FILES

DECISION

Roy Calvin Westmoreland	:	Indian Allotment Application

Decision Vacated
Case Remanded

Roy Calvin Westmoreland has appealed from a decision of the Manager, dated October 20, 1961, rejecting his Indian allotment application, a homestead application, and a large number of public sale and small tract applications. In his decision, the Manager listed several reasons why the public lands in the area embraced by the various applications are not suitable for sale or entry at the present time, indicating that one or more of the reasons applied to the lands described in each application included in the decision.

An examination of the record discloses, however, that due consideration was not given to the particular characteristics of the land for which Mr. Westmoreland has applied and the circumstances under which his application was filed. Accordingly, the decision of the Manager is vacated insofar as it rejects the appellant's application and the case record is remanded to the Manager, through the Bureau's California State Director, for further individual consideration and appropriate action. If further study of the land is needed before it can be classified for its best use, the appellant's application should be suspended pending the outcome of the study.

Richard J McCormick

Chief, Branch of Land Appeals
Division of Appeals

DISTRIBUTION:

Mr. Orrin K. Airola, Attorney for the appellant (Regular Mail)
Mr. Roy Calvin Westmoreland (Regular Mail)
Division of Land & Recreation
SD (California)
LO (Sacramento)
Case File
Perm. File
Attorney's Reading File
Appeals Reading File
LLM

appeal to Sec

DOCKET FILES

Dismissed A-29795 12-20-62

DEPT. OF INTERIOR
SACRAMENTO, CAL.
AUG 20 10 15 AM 1962
BUREAU OF
LAND MANAGEMENT
LAND OFFICE

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

In reply refer to:
Sacramento
064654

August 10, 1962

Certified Mail
Return Receipt Requested

DECISION

	:	
Roy Calvin Westmoreland	:	Indian Allotment Application
	:	
	Decision Affirmed	

Roy Calvin Westmoreland has appealed from a decision, dated May 14, 1962, rejecting his Indian allotment application for 20.5 acres of land for the reason that the land should be retained for its timber value and recreational potential and therefore cannot be properly classified for disposal under the Indian Allotment Act. The decision also stated that the applicant had erected a shed and cabin on the land, developed water for domestic use and had occupied the land for approximately 6 weeks, but that the land was withdrawn from settlement and entry by Executive Order 6910 of November 26, 1934, and is not subject to Indian allotment or settlement until the land is classified as suitable for such purpose under Section 7 of the Taylor Grazing Act, citing Alexander Bateman et al., A-27203 (November 9, 1955).

The appellant alleges that on November 26, 1934, the subject land was occupied under a mining claim, therefore, it was not vacant, unreserved, or unappropriated within the provisions of Executive Order No. 6910 and that the timber values and recreational potential of the land is speculative and negligible compared to the value of providing the applicant, whose occupation is heavy duty equipment operator, with a home and place to raise his family.

The classification report shows that the subject land is included in the Sacramento District Management Plan because it is a timber site and has definite recreational potential as a public picnic site. The land is not suitable for agricultural development or for grazing.

The statement of reasons for appeal does not state when the mining claim was located, or assert the mining claim is valid, or work is being prosecuted in search of mineral. On the contrary, the application for allotment, filed on October 6, 1960, states that the improvements on the land were made "for domestic uses". In a similar case, where the mining claimant filed an application for homestead entry, the Department held that the application had the legal effect of an abandonment of all estate, right or interest he may have in the prior mining location. Clarence H. Steussy 58 I.D. 474,478 (1943) and cases cited therein.

There is no merit to the allegation that the timber and recreational values of the land are comparatively negligible. The classification report shows that the use proposed by the applicant was considered and the highest use of the land was determined to be retention for its timber and recreational values. This classification will not be disturbed in the absence of substantial, positive evidence that the classification is erroneous. Lillian Shermoen, A-28119 (January 15, 1960).

Accordingly, the decision is affirmed.

Roy Calvin Westmoreland is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken the amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations.

Richard J McCormick
Chief, Branch of Land Appeals
Division of Appeals

Enclosure

DISTRIBUTION

Mr. Orrin K. Airola, Attorney for Appellant (Certified Mail)
Mr. Roy Calvin Westmoreland (Regular Mail)
SD (California)
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MHS

DOCKET FILES

In reply refer to:
[illegible]
Sacramento [illegible]

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D.C. 20240

October 15, 1963

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

Albert Edward [illegible] : Indian Allotment Application [illegible]

Decision Affirmed

Albert Edward [illegible] has appealed from a decision of the Sacramento land office, dated April 9, 1963, rejecting his above-identified application for the stated reason that the land applied for has been classified as unsuitable for settlement as an Indian allotment because of adverse topography, poor soil, and lack of surface water.

On appeal, Mr. [illegible] contends, in substance, that when an official decision is based upon a report of land classification as in the instant case, the party adversely affected should have full opportunity to examine the report and all of its contents, that the first opportunity he had to learn of the existence of such report was the decision rejecting his application, and that no opportunity has been given him to meet adverse evidence presented and on which the official decision was based. The appellant alleges, also, that the intent of the Congress has always been to apply a great degree of liberality in the construction of the allotment laws and that the courts have consistently upheld that approach.

Land withdrawn by the general withdrawal of November 26, 1934, as amended (Executive Order 6910), as was the land applied for by the appellant, is not subject to settlement or occupation under section 4 of the General Allotment Act of February 8, 1887, as amended (25 U.S.C. 334) until such settlement has been authorized by classification under section 7 of the Taylor Grazing Act, as amended (43 U.S.C. 315f). Jean Marie Smith et al., A-[illegible] (September 27, 1962), [illegible], footnote 1. Nor do any rights vest in an applicant as a result of the filing of an application for such land. [illegible] et al., Sacramento [illegible] (March 23, 1962).

The Department recognizes the right of eligible Indians to select, settle, and appropriate public lands in accordance with the General Allotment Act, supra. However, the selection right carries with it no right to a particular tract of land. Rejection of a particular application is neither an impairment nor a denial of that right. The right continues to exist unimpaired and will be permitted to be exercised when consideration is extended to lands suitable for such disposition. Cf. [illegible], A-[illegible] (December 12, 1962). The appellant is therefore not precluded from applying for an allotment of another tract of land if he so desires.

DOCKET FILES

DEPT. OF INTERIOR
SACRAMENTO, CAL.
OCT 24 10 00 AM 1963
BUREAU OF
LAND MANAGEMENT
LAND OFFICE

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D.C. 20240

In reply refer to:
6.05c
Sacramento 059344

October 15, 1963

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

Albert Edward Elmore : Indian Allotment Application
:
:
Decision Affirmed

Albert Edward Elmore has appealed from a decision of the Sacramento Land Office, dated April 9, 1963, rejecting his above-identified application for the stated reason that the land applied for has been classified as unsuitable for settlement as an Indian allotment because of adverse topography, poor soil, and lack of surface water.

On appeal, Mr. Elmore contends, in substance, that when an official decision is based upon a report of land classification as in the instant case, the party adversely affected should have full opportunity to examine the report and all of its contents; that his first opportunity to learn of the existence of such report was the decision rejecting his application; and that no opportunity has been given him to meet adverse evidence presented and on which the official decision was based. The appellant alleges, also, that the intent of the Congress has always been to apply a great degree of liberality to the construction of the allotment laws and that the courts have consistently upheld this approach.

Land withdrawn by the general withdrawal of November 26, 1934, as amended (Executive Order 6910), as was the land applied for by the appellant, is not subject to settlement or occupation under section 4 of the General Allotment Act of February 8, 1887, as amended (25 U.S.C. 336) until such settlement has been authorized by classification under section 7 of the Taylor Grazing Act, as amended (43 U.S.C. 315f). John David Smith et al., A-28829 (September 17, 1962); 43 CFR Part 176, footnote 1. Nor do any rights vest in an applicant as a result of the filing of an application for such land. Carole Hayward et al., Sacramento 048366 (March 25, 1958).

The Department recognizes the right of eligible Indians to enter, select, and appropriate public lands in accordance with the General Allotment Act, *supra*. However, the selection right carries with it no right to a particular tract of land. Refusal to approve a particular application is neither to repudiate nor to destroy that right. The right continues to exist unimpaired and will be permitted to be satisfied when exercised with reference to lands suitable for such disposition. Cf. G. A. Williams, A-25972 (December 27, 1950). The appellant is therefore not precluded from applying for an allotment of another tract of land if he so desires.

The appellant's presentation on appeal has been considered and is found insufficient to establish that the land applied for is suitable for settlement as an Indian allotment; therefore, the classification will not be disturbed.

The record discloses that the appellant was afforded ample opportunity to examine the case record and the report contained therein which was the basis for the determination in the decision from which appeal is taken, the appellant having been accorded the usual 30-day period from date of receipt of the decision appealed from within which to file a notice of appeal therefrom and the 30-day period from the date of filing of his notice of appeal within which to submit a statement of the reasons for his appeal, written arguments or a brief. In addition, at the request of the appellant, a 30-day extension of the time for filing his statement of reasons for appeal was allowed as well as a further 30-day extension of time for the submission of any supplementary information or documentary evidence he desired to submit in support of his appeal 43 CFR 221.97. No such additional showing on appeal was received.

Therefore, the decision appealed from is affirmed.

Albert Edward Elmore is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington D.C. 20240, and the amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving, by presenting positive and substantial evidence, wherein the decision appealed from is in error.

Dale E. Zimmerman
Chief, Division of Appeals

Enclosure

DISTRIBUTION:
Mr. Milton L. McGhee, Attorney for Appellant (Certified Mail)
Mr. Albert Edward Elmore
Hon. Harold T. (Bizz) Johnson, House of Representatives
Division of Lands and Recreation
Appeals List No. 1
MAG

DOCKET FILES

DEPT. OF INTERIOR
SACRAMENTO, CAL.

NOV 21 10 00 AM 1963

BUREAU OF
LAND MANAGEMENT
LAND OFFICE

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D.C. 20240

In reply refer to:
6.05c
Riverside 02984 etc.

November 15, 1963
CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

Cora Elizabeth (Walker) Smith *et al.* : Indian Allotment Applications

Decisions Affirmed

Cora Elizabeth (Walker) Smith and six other Indian allotment applicants [1] have appealed from decisions by the Riverside Land Office Manager, dated August 30, 1963, which rejected their respective applications. Each of the Manager's decisions listed five specific reasons which facilitated the conclusion that the lands cannot be classified as suitable for Indian allotment purposes under the Act of February 8, 1887.

Appellants have presented, as justification for appeal, broad policy arguments. They contend that the Federal Government should be interested in disposing of lands now held in Federal ownership to continue the development and settlement of the United States, apparently, without consideration of management, police and fire protection, economics, present use, and future use of lands.

All vacant, unreserved, and unappropriated public lands in California were withdrawn from settlement and entry by Executive Order 6910 of November 26, 1934. Section 7 of the Taylor Grazing Act, as amended (43 U.S.C., 1958 ed., sec. 315f), authorizes the Secretary of the Interior, in his discretion, to examine and classify any lands withdrawn or reserved by Executive Order 6910 and to open such lands to entry, selection, or location in accordance with such classification under the applicable land laws. Consequently, the regulations promulgated by the Secretary of the Interior on Indian allotments have endeavored to place before the public the fact that public land withdrawn by Executive Order 6910 "is not subject to settlement under section 4 of the General Allotment Act of February 8,

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[1] Other appellants herein are the following:

Bettizane Smith	Riverside 02985
Tauron (Kenny D.) Walker	" 02987
Joyce Gale Walker	" 02988
Bertrand Thomas Walker	" 02989
Janet Sue (Holt) Slemko	" 02990
Marizane (Holt) Lilien	" 03037

1887, as amended, until such settlement has been authorized by classification" under section 7 of the Taylor Grazing Act (43 CFR, Part 176, fn. 1). Thus, the Bureau of Land Management is required by law to consider multiple factors in its determination of the proper classification and use of public lands.

Inasmuch as the land involved has not been classified under Section 7 of the Taylor Grazing Act as suitable for occupancy under the Indian Allotment Act, the burden is upon appellants to show by positive and substantial evidence that the manager's conclusion complained of is in error. Cf. Lillian Shermoen, A-28119 (January 4, 1960). Appellants have merely denied the correctness of the classification, and have made broad self-serving statements. Such arguments are clearly insufficient to support their appeal. Accordingly, the applications were properly rejected.

Our rejection of the applications neither questions the eligibility which appellants have under the Indian Allotment Act of February 7, 1887, as amended, nor their continued right to file applications to select other land for acquisition under that act. Our rejection merely determines that the subject applications cannot be allowed for this particular land.

Regarding appellants' contention that the Land Office Manager should not have considered the protest filed by Deep Springs College concerning its present grazing operations on the subject lands, the Act of April 23, 1904 (33 Stat. 297, 25 U.S.C. 343), cited by appellants, and regulations thereunder (notably 43 CFR 176.14) are concerned with the attack by a third party where the allotment application has been allowed and a trust patent issued. Nothing in that act prevents interested parties from being given reasonable notice of a classification or a proposed classification for the purpose of comment or protest. Cf. 43 CFR 296.3 as constituted prior to June 14, 1963. Thus, reasons 3 and 4 of the Manager's decision are clearly relevant to his conclusion that the subject lands are chiefly valuable for grazing and raising forage crops and should be retained in Federal ownership. Whereas, reason number 5 is not an applicable justification for the facilitated classification.

Accordingly, the decision appealed from is hereby affirmed.

Each of the appellants herein are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington D.C. 20240, and the amount of the filing fee will be $5 for each application upon which favorable action is sought. Thus, if all seven appellants were to taken an appeal to the Secretary of the Interior, the total amount of the filing fees would be $35. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed, the appellant will have the burden of proving, by presenting positive and substantial evidence, wherein the decision appealed from is in error.

Richard J McCormick
Chief, Branch of Land Appeals
Division of Appeals

Enclosure

DISTRIBUTION
Each appellant
Virgil J. Butler, Attorney at Law (Certified Mail)
Division of Lands and Recreation
Appeals List No. 1
BRA

[illegible]

In reply refer to:
[illegible]
Sacramento 075909

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

January 31, 1966

Certified Mail
Return Receipt Requested

DECISION

Stella Forrest : Indian Allotment Application

Decision Affirmed

Stella Forrest has appealed from a decision of the Sacramento Land Office, dated May 13, 1965, rejecting her Indian allotment application for 5.125 acres of land for the following reasons:

1. The tract is too small for Indian allotment purposes, under 43 CFR 172.5.
2. The highest and best use of the land is for small tracts; the tract has been classified for small tracts; and the small tract classification is still in effect.

The appellant alleges that the land is suitable for Indian allotment because it has contained the family home for 18 years and it is suitable for such residential use.

Departmental regulation 43 CFR 257.3(c) provides, that lands classified for small tracts are segregated from all appropriations, except, where there is a modification or revision of the classification order. This tract has not only been classified for small tracts, but it has been determined that its highest and best present use is for small tract purposes. Therefore, the land is not available for disposal as an Indian allotment.

Moreover, even if the land had not been classified for small tracts, the Department has ruled that to qualify as an allotment the tract must have the following conditions: "Sufficient

DOCKET FILES

In reply refer to:
6.05c
Sacramento 074902

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

January 30, 1964

FEB 6 10 AM 1964
BUREAU OF
LAND MANAGEMENT
LAND OFFICE

Certified Mail
Return Receipt Requested

DECISION

Stella Forrest	:	Indian Allotment Application

Decision Affirmed

Stella Forrest has appealed from a decision of the Sacramento Land Office, dated May 13, 1963, rejecting her Indian allotment application for 3.125 acres of land for the following reasons:

1. The tract is too small for Indian allotment purposes, under 43 CFR 176.9.
2. The highest and best use of the land is for small tracts; the tract has been classified for small tracts; and the small tract classification is still in effect.

The appellant alleges that the land is suitable for Indian allotment because it has contained the family home for 18 years and it is suitable for such residential use.

Departmental regulation 43 CFR 257.3(b) provides, that lands classified for small tracts are segregated from all appropriations; except, where there is a modification or revision of the classification order. This tract has not only been classified for small tracts, but it has been determined that its highest and best present use is for small tract purposes. Therefore, the land is not available for disposal as an Indian allotment.

Moreover, even if the land had not been classified for small tracts, the Department has ruled that to qualify as an allotment the tract must have the following qualities: "Sufficient arable land to support an Indian family and is on the whole suitable for a home for the allottee." Indian Lands--Allotments--Sec. 4, Act of February 8, 1887, 32 L.D. 17, 19 (1903). The applied-for tract may be suitable for a home, but it does not contain sufficient arable land to support an Indian family. Thus, it cannot qualify as an allotment because it does not meet both mandatory requirements.

Accordingly, there is no basis for modifying or revising the classification order and the decision is affirmed.

Stella Forrest is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 211, as amended. See enclosed Form 4-1365. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240, and the amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving, by presenting positive and substantial evidence, wherein the decision appealed from is in error.

Richard J McCormick

Chief, Branch of Land Appeals
Division of Appeals

Enclosure

DISTRIBUTION

Stella Forrest (Certified Mail)
Division of Lands and Recreation
Appeals List No. 1
MHS

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Native Allotments: Applications 2212.1-1

An Indian allotment application for non-irrigable grazing land is properly rejected on the ground that the land applied for is not proper for acquisition as an Indian allotment because it does not have substantial carrying capacity and sufficient forage to constitute an economic grazing unit.

Elena S. Sayers, Sacramento 075908 (September 21, 1964)

In reply refer to:
704
Sacramento 075908
September 21, 1964

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D.C. 20240

CERTIFIED MAIL
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DECISION

Elena S. Sayers : Indian Allotment Application
:
:

Decision Affirmed

Elena S. Sayers has appealed from a decision of the Sacramento Land Office, dated June 5, 1964, rejecting her application for an Indian allotment of 123.42 acres of non-irrigable grazing land, under section 4 of the Act of February 8, 1887, as amended (25 U.S.C. 336). The application was rejected for the reason that it would not be proper to classify the land sought for Indian allotment because it does not comprise an economic unit for farming or grazing use.

The appellant alleges that while the land applied for may not by itself be an economic unit, it, together with adjoining patented land owned by the applicant, will "more nearly" make her whole property an economic unit. She asserts that her livestock needs "all the forage the marginal properties can provide."

A field examination report shows that the subject land has a grazing carrying capacity of only 7½ AUM's. It also shows that only 25 of the 123.42 acres applied for could be reclaimed and used for sheep grazing, and that this would be on a calculated risk basis.

The Department has held that in an area where an economic ranch unit would require enough land to support in excess of 100 units of livestock, it was proper to reject an Indian allotment application for 160 acres of land that would support only two units of livestock on a year-round basis. See John E. Balmer et al., 71 I.D. 66 (1964) which cites Amos A. Hopkins (Dukes), Colorado 0112669, decided by the Secretary on December 20, 1963.

The land sought by the appellant is not substantially better than the land considered in the Hopkins case, supra.

Therefore, the Land Office decision was correct and it is affirmed.

Elena S. Sayers is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240 and the amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving, by presenting positive and substantial evidence, wherein the decision appealed from is in error.

An applicant for Indian allotment is not, of course, deprived of the right to an allotment when his application is rejected. The right continues to exist unimpared and will be permitted to be satisfied when exercised with reference to land available for disposition. Lillian Shermoen, A-28119 (January 15, 1960).

Mrs. Sayers is therefore not precluded from applying for the allotment of other land if she so desires.

John C. Piccolo
Chief, Branch of Land Appeals
Office of Appeals and Hearings

Enclosure

DISTRIBUTION:
Elena S. Sayers (Certified Mail)
Div. of L&M, S&T (4)
Div. of L&M PM (2)
Appeals List No. 1
MHS

DOCKET FILES

Native Allotments: Generally 2212

An appeal to the Director will be remanded where an applicant for an Indian allotment alleges, for the first time, facts which may be decisive of his rights in certain public lands.

William Charles Scott, Riverside 05635 (December 11, 1964)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1964 DEC 21 AM 10 00

In reply refer to:
704
Riverside 05635

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D.C. 20240

December 11, 1964

DECISION

William Charles Scott : Indian-Allotment
:
Case Remanded

William Charles Scott has appealed from a decision of the Riverside Land Office, dated October 6, 1964, rejecting his petition-application for an Indian allotment, filed on August 21, 1964, for certain lands in California. The reason for the rejection was that the lands sought are not subject to appropriation because:

1. They have been withdrawn from disposal by departmental order of January 21, 1933 for Stock-driveway #235.

2. They are within the boundaries of the Monache-Walker Pass National Cooperative Land and Wildlife Management Area.

3. They were withdrawn from appropriation under the non-mineral public land laws by Public Land Order 2594, dated January 22, 1962.

The appellant alleges that the statement in his application "that he has used or occupied the land for 5 years" is not correct. He states that "That figure should have been fifty five (55) years I have lived here all my life."

Under these circumstances, the applicant may have acquired rights in the land prior to its withdrawal on January 21, 1933, for a stock driveway pursuant to the Act of June 25, 1910 (36 Stat. 847; 43 U.S.C. 141-143, 16 U.S.C. 471).

Accordingly, the case is remanded to the Land Office, through the Bureau's State Director, for further consideration.

James F. Doyle
Chief, Office of Appeals
and Hearings

DISTRIBUTION:
William Charles Scott
Div. of L&M, S&T (4)
Div. of L&M PM (1)
Bureau of Indian Affairs, Sacramento Area Office
Appeals List No. 1
MHS

DOCKET FILES

Classification: Generally 2410

Applications under the Indian Allotment Act for acquired lands under the jurisdiction of a Federal agency, over which lands the Bureau of Land Management has no authority, are not subject to the land classification provisions of 43 CFR, part 2410.

Native Allotments: Generally [illegible]

Applications under the Indian Allotment Act for acquired lands under the jurisdiction of a Federal agency, over which lands the Bureau of Land Management has no authority, are not subject to the land classification provisions of 43 CFR, part 2410.

Words and Phrases

The term "public lands" generally does not include lands acquired by the United States from private ownership.

Bobby Lee Moore et al., [illegible] etc. (January [illegible])

appeal to Sec
affirmed
A-30433
11-1-65

DOCKET FILES
Misc

Classification: Generally 2410

Application under the Indian Allotment Act for Acquired lands under the jurisdiction of a Federal agency, over which lands the Bureau of Land Management has no authority, are not subject to the land classification provisions of 43 CFR, part 2410.

Native Allotments: Generally 2212

Applications under the Indian Allotment Act for acquired lands under the jurisdiction of a Federal Agency, over which lands the Bureau of Land Management has no authority, are not subject to the land classification provisions of 43 CFR, part 2410.

Words and Phrases

The term "public lands" generally does not include lands acquired by the United States from private ownership.

Bobby Lee Moore et al., Riverside 05607 etc. (January 22, 1965)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1965 FEB 1 AM 10 00

In reply refer to:
704
Riverside 05607 thru
05613

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D.C. 20240

January 22, 1965

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

Bobby Lee Moore :
Elsie Whitecrow Moore :
Donald Edwin Moore :
Donald Edwin Moore, Guardian for Sandra Gay Moore, Minor :
Bobby Lee Moore, Guardian for Bret Whitecrow Moore, Minor :
Donald Edwin Moore, Guardian for Terry Stephen Moore, Minor :
Bobby Lee Moore, Guardian for Robert Leo Moore, Minor :

Indian Allotment
Petition - Application

Decisions Affirmed

The persons named above have appealed from separate decisions of the Riverside District and Land Office dated September 28, 1964, rejecting their petition-applications for separate Indian allotments, for the reason that the Bureau of Land Management has no jurisdiction over the applied-for lands. The decisions state:

> ". . . [T]he lands sought in the petition-application were within the boundaries of the Rancho Mission (Ex) San Diego Grant, confirmed by patent issued on September 1, 1876. . . . Although the lands were subsequently acquired by an agency of the United States Government for use as a part of the Camp Elliot Naval Reservation, the jurisdiction or administration of the lands has never been assigned or transferred to the Department of the Interior and the Bureau of Land Management is without authority to act upon a petition-application seeking such lands."

The decisions of September 28, 1964 were preceded by separate letters, dated August 21, 1964, to each applicant, which contained the same information quoted above and advised that if the petitioners do not withdraw their petition-applications within 30 days, the petition-applications would be rejected by a formal decision.

The petitioners protested the letter-decisions of August 21, on the basis of the definition of the word "property" in 40 U.S.C. sec. 472(d). The decisions from which these appeals were taken pointed out that acquired lands are not ipso facto restored to the public domain upon acquisition by the Government.

The appellants allege, in essence, as follows:

1. Their petition-applications should have been considered under departmental regulations 43 CFR, Part 2411, (Land Classification) and that the provisions of the regulations in part 1840 (appeals procedures) are not applicable; therefore, the decision of the Land Office should be vacated and an initial decision should be rendered by the Bureau's State Director.

2. If the September 28 decision is construed to be the decision of the State Director, then, the supervisory authority of the Secretary should be exercised in accordance with section 2411.2.

3. The applied-for land was acquired by the United States by condemnation and "It instantly became Federal property (public land or public domain land)"

4. "Public lands' or 'public domain lands' are purely and simply Federally-owned lands."

5. "If its character [the land in question] when acquired by the United States by condemnation was such that it would have been suitable for disposition under the general public land laws and this character has not been lost by virtue of improvements placed on the land while held by the Navy, it must be transferred to the Department of the Interior (the land is necessarily outside the jurisdiction of the General Services Administration)."

6. This land has not been improved, therefore, the Secretary of the Interior could not determine that the land is not suitable for disposition under the general public land laws.

The decision by the Land Office that the Bureau of Land Management has no jurisdiction over the applied-for lands, was not a land classification under the provisions of 43 CFR, Part 2410; it constituted a finding of law that the subject lands are not public domain within the meaning of the Indian Allotment Act and the regulations thereunder, 43 CFR 2212.0-3. Cf. *El Mirador Hotel Company*, 60 I.D. 299 (1949). Therefore, there is no merit to the allegation that the Land Office, the State Director, and the Secretary were bound by the provisions of 43 CFR, Part 2411 in these cases.

The departmental regulation which considers the qualifications of applicants, 43 CFR 2212.0-6 specifically refers only to allotments of land "on the public domain."

The Department has ruled that public land which has been properly patented and passed into private ownership does not regain its status as public land upon being acquired subsequently by the United States through purchase or condemnation, *El Mirador Hotel Company*, *supra*. See also 40 Op. Atty. Gen. 9 (January 3, 1941) cited in the *El Mirador* decision. Consequently, it must be concluded that the lands in question are not "public land" within the meaning of the Indian Allotment Act.

Moreover, the appellants' have not shown that the provisions of 40 U.S.C. sec. 472(d) were ever intended to apply to the Indian Allotment Act of February 8, 1887 (25 U.S.C. 334), as amended, or that the Secretary of the Interior has any jurisdiction over land purchased by the Navy Department and subsequently transferred to the General Services Administration. This they are required to do. Cf. *United States and Salt Lake City* v. *Wayne E. We[illegible]*, A-27759 (May 15, 1959); *Donald R. Simmons*, A-28581 (July 14, 1961).

Finally, 40 U.S.C., sec. 304a, specifically authorizes the General Services Administration, "notwithstanding any other provision of law" to sell surplus real property "acquired by any Federal agency," "upon such terms as may be deemed to be to the best interest of the Government." Therefore, the land is not outside the jurisdiction of the General Services Administration, as alleged by the appellants.

Any other conclusion would, in the language of the *El Mirador* decision, "lead to absurd consequences."

Accordingly, the decisions of September 28 were proper and they are affirmed.

Each appellant is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D.C. 20240. The filing fee will be computed on the basis of $5 for each application included in the appeal. If the appeal covers all applications adversely affected by this decision the total filing fee is $35. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving, by presenting positive and substantial evidence, wherein the decision appealed from is in error.

James F. Doyle
Chief, Office of Appeals
and Hearings

Enclosure

DISTRIBUTION:
Donald Joy Solomon, Attorney at Law (Certified Mail)
Each Appellant
Div. of L&M S&T (4)
Div. of L&M PM (2)
Appeals List No. 1
MHS

appeal to Sec
affirmed A-30483
11-18-65

DOCKET FILES

DEPT. OF INTERIOR
BUR. OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE

1965 APR 29 AM 10 00

Native Allotments: Generally 2212

Indian Allotment petition-applications for lands which have been confirmed by patent in a Mexican land grant and over which lands the Bureau of Land Management has no jurisdiction, are properly rejected.

Auquita L. Kluenter et al., Riverside 06406 etc. (April 20, 1965)

DEPT. OF INTERIOR
BUR. OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1965 APR 29 AM 10 00

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D.C. 20240

In reply refer to:
704
Riverside 06406 thru
06409

April 20, 1965

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

Anquita L. Kluenter :
Moses Lewis : Indian-Allotment Petition-Application
Gary Carson Lewis :
Gary Carson Lewis, Guardian :
for Shelley Ann Lewis, Minor :

Decisions Affirmed

The above-named applicants have appealed from separate decisions of the Riverside District and Land Office, dated March 2, 1965, rejecting their petition-applications for Indian Allotments, under the provisions of Section 4 of the Act of February 8, 1887 (24 Stat. 388; 25 U.S.C. 334), as amended. The applications were rejected because:

> "Examination of the Riverside District and Land Office records discloses that the lands sought . . . lie within the boundaries of the Rancho El Cajon, confirmed by patent issued . . . on April 6, 1876. This claim was founded on a Mexican Land Grant . . . made on September 23, 1845 . . . . Inasmuch as the lands applied for are not under the jurisdiction of the Bureau of Land Management, the petition-application is hereby rejected."

The appellants allege, in their statements of reasons for appeal, that the issues of fact and law in these cases are basically the same as those involved in Bureau decision Bobby Lee Moore et al., Riverside 05607 etc. (January 22, 1965). Therefore, the appellants request that these cases be consolidated with the Moore cases which are now pending on appeal to the Secretary of the Interior.

The Moore cases involve Indian allotment applications for acquired lands over which the Bureau of Land Management has no jurisdiction but are under the jurisdiction of another agency of the Federal government. The appellants have submitted no evidence in support of the appeals in the instant cases showing that the applied-for Mexican grant lands are acquired lands. In the absence of such evidence, the appeals can be considered only on the basis of the information contained in official Bureau records.

The Department has ruled that lands which have been confirmed by patent in a Mexican land grant never became a part of the public domain of the United States and the Bureau of Land Management has no jurisdiction over such lands. See Richard P. Woitke, A-27875 (April 2, 1959) and the cases cited therein.

Accordingly, the decisions are affirmed.

Each applicant is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. The filing fee will be computed on the basis of $5 for each application included in the appeal. If the appeal covers all applications adversely affected by this decision the total filing fee is $20. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving, by presenting positive and substantial evidence, wherein the decision appealed from is in error.

John B. Piccolo
Chief, Branch of Land Appeals
Office of Appeals and Hearings

Enclosures

DISTRIBUTION:
Donald Jay Solomon, Attorney at Law (Certified Mail)
Each Appellant
Div. of L&M, S&T (4)
Div. of L&M PM (2)
Appeals List No. 1
MHS

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DOCKET FILES

Indian Allotments: Applications--National Forests

Applications for Indian allotments within a national forest under section 31 of the act of June 25, 1910, are properly rejected where the Indian has not lived on, occupied or placed improvements on the land and the Department of Agriculture has determined that the land is more valuable for forest purposes than for agriculture and grazing purposes.

Mary Hunter Rogers, Sacramento 441 (Aug 3, 1977)

The Department has ruled that lands which have been confirmed by patent in a Mexican land grant never became a part of the public domain of the United States and the Bureau of Land Management has no jurisdiction over such lands. See Richard P. Knight, A-27875 (April 8, 1959) and the cases cited therein.

Accordingly, the decisions are affirmed.

Each applicant is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840 (See enclosed Form 4-1364-1 and Circular 2137). If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. The filing fee will be computed on the basis of $5 for each application included in the appeal. If the appeal covers all applications adversely affected by this decision the total filing fee is $60. In taking an appeal, there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving, by presenting positive and substantial evidence, that the decision appealed from is in error.

John B. Crowell

Chief, Branch of Land Appeals
Office of Appeals and Hearings

Enclosures

Distribution:
Donald Jay Nelson, Attorney at Law (Certified Mail)
Each appellant
Dir. of Mgt. ENM (4)
Div. of LAM NM (2)
Appeals List No. 1
MCB

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DOCKET FILES

Indian Allotments: Applications--National Forests

Applications for Indian allotments within a national forest under section 31 of the act of June 25, 1919, are properly rejected where the Indian has not lived on, occupied or placed improvements on the land and the Department of Agriculture has determined that the land is more valuable for forest purposes than for agriculture and grazing purposes.

Mary Evelyn Bussert, Sacramento 411 (May 3, 1967)

DEPT. OF INTERIOR
BUR. OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1967 JUN 5 AM 10 00

In reply refer to:
704
S-411

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D.C. 20240

May 3, 1967

CERTIFIED MAIL
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DEPT. OF INTERIOR
BUR. OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1967 JUN 5 AM 10 00

DECISION

Mary Evelyn Bussert : Indian Allotment

Decision Affirmed

Mrs. Mary Evelyn Bussert has appealed from a decision of the Sacramento Land Office dated February 16, 1967, which rejected her Indian allotment application for certain lands within the Klamath National Forest, California. The application was filed pursuant to section 31 of the act of June 25, 1910, 36 Stat. 863, 25 U.S.C. § 337 (1964), which provides as follows:

> "That the Secretary of the Interior is hereby authorized, in his discretion, to make allotments within the national forests in conformity with the general allotment laws, to any Indian occupying, living on, or having improvements on land included within any such national forest who is not entitled to an allotment on any existing Indian reservation, or for whose tribe no reservation has been provided, or whose reservation was not sufficient to afford an allotment to each member thereof. All applications for allotments under the provisions of this section shall be submitted to the Secretary of Agriculture, who shall determine whether the lands applied for are more valuable for agricultural or grazing purposes than for the timber found thereon; and if it be found that the lands applied for are more valuable for agricultural or grazing purposes, then the Secretary of the Interior shall cause allotment to be made as herein provided."

In its decision rejecting the application, the Sacramento Land Office referred to a report from the Regional Forester, California Region, acting in behalf of the Secretary of Agriculture, that the applicant had placed no improvements on the land and has not occupied it and that the land is more valuable for national forest purposes as contemplated by the acts of June 4, 1897, 30 Stat. 34, 16 U.S.C. § 475 (1964), and June 12, 1960, 74 Stat. 215, 16 U.S.C. § 528-531 (1964) than for agricultural or grazing purposes. These statutes set forth the policy of administering the forest lands to protect the public interest in securing a timber supply, in watershed control (the act of June 4, 1897), and in multiple use (the act of June 12, 1960), specifically for outdoor recreation, range, timber, watershed, and wildlife and fish purposes.

The land applied for consists of 18 acres of which the Forest Service found that (1) approximately 5 acres are covered by grass and 13 are covered with

Ponderosa Pine of all age classes and manzanita brush, (2) the grass area is a result of a man-made clearing in a timber type which was made in the 1880's or 1890's.

The appellant contends, in substance, that the land applied for is part of her father's original land use and home which in 1904 he had cleared, built fences and irrigated, that the clearing referred to by the Regional Forester is not man-made but a natural meadow and that there were two houses occupied by her father's relatives one of which burned in 1910 and the other in 1918. The appellant states that she has irrigated ditches on the land and grazing stock upon it and believes this would be called improvements. Appellant further asserts that until recent times there was no timber on parts of the land applied for and that it would be hard to find twenty five thousand feet of commercial timber at the present and that if the Forest Service is looking for a trade for the land in question, it cannot be valuable for the timber. Mrs. Bussert, in conclusion, requests an extension of time to submit further evidence if her allegations do not answer the Forest Service's report satisfactorily.

The right of an Indian to an allotment within a national forest is governed by the provisions of section 31 of the act of June 25, 1910, supra. This act has three conditions which must be satisfied before an allotment may be granted. First, the Indian must be in the class described in the act and must be "occupying, living on, or having improvements on land included within any such national forest." Second, the Secretary of Agriculture must determine that the lands applied for are more valuable for agricultural or grazing purposes than for the timber found thereon. Third, the act provides that the making of allotments is in the discretion of the Secretary of the Interior; therefore, if there are reasons why in the exercise of his discretion the Secretary determines that an allotment should not be allowed, this is sufficient reason to reject an allotment application. In this case, it does not appear that the first two conditions are satisfied; consequently there is no occasion for the Secretary to exercise his discretion in determining whether the allotment should be allowed. Robert Minkey et al., A-30706 (March 28, 1967).

Section 31 of the 1910 act authorizes an allotment only to an Indian "occupying, living on, or having improvements on land." Other than the appellant's unsupported statement that she has irrigation ditches on the land, the report of the Department of Agriculture indicating that there are no existing improvements thereon must be accepted.

As to the second condition for allowance of an allotment, the Forest Service has reported that the land is more valuable for national forest purposes than for agriculture or grazing. Other than appellant's unsupported and general statements there has been no refutation of this determination, and the report of the Department of Agriculture's determination in this matter must be accepted. Even though the appellant's assertion that there are only a few thousand feet of timber on the land is accepted on its face, the first condition still would not be satisfied and an extension of time to submit further evidence along this line would serve no useful purpose. Any proposed "trade" of lands has no relevance to the points in issue.

As shown, the first two conditions having not been fulfilled, we need not consider the third condition relative to the exercise of discretion by the Secretary of the Interior. Where allowance of an allotment is discretionary with the Secretary of the Interior, an Indian has no vested right to an allotment of a particular parcel of land. Cf. Daniels v. United States, 247 F. Supp. 193 (D.C. W.D. Okla. 1965).

In view of the foregoing, the decision appealed from was proper and is hereby affirmed.

Mary Evelyn Bussert is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240 and the amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving, by presenting positive and substantial evidence, wherein the decision appealed from is in error.

If an appeal is taken the adverse party to be served is:

Regional Forester
California Region,
Forest Service
United States Department of Agriculture
630 Sansome Street
San Francisco, California 94111

Edward W. Stuebing
Chief, Branch of Land Appeals
Office of Appeals and Hearings

Enclosures
DISTRIBUTION:
Mrs. Mary Evelyn Bussert (Certified Mail)
Area Director, Sacramento Area Office, Bureau of Indian Affairs
Regional Forester, California Region
Div. of L&M S&T (4)
Div. of L&M PM (2)
OPD
Div. of Watershed Management, Forest Service U.S. Dept. of Agriculture (12)
Appeals List No. 1
JBJ

DEPT. OF INTERIOR
BUR. OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE

1967 JUN 5 AM 10 00

Native Allotments: Allotments in National Forests 2212.3-3

An application for an Indian allotment within a national forest under section 31 of the Act of June 25, 1910, is properly rejected where the Indian has not lived on, occupied or placed improvements on the land and the Forest Service of the Department of Agriculture has determined that the land sought by the applicant is more valuable for forest purposes than for agricultural and grazing uses.

Withdrawals and Reservations: Power Sites 2327.1

Reclamation 2323

An Indian allotment application for withdrawn land must be rejected.

Appeals Procedure: Generally (Laches) 1840

Where an application for an Indian allotment which was filed in 1957 is rejected by the Land Office and the record shows on appeal that an application for the same land was previously applied for by applicant's father, for her benefit, and that application was rejected in 1918 by the General Land Office, an appeal requesting reconsideration of the 1918 decision is subject to rejection because of laches.

Zella Curl Brown, [illegible] (Aug 13, 1962)

Native Allotments: Allotments in National Forests 2212.2-3

An application for an Indian Allotment within a national forest under section 31 of the act of June 25, 1910, is properly rejected where the Indian has not lived on, occupied or placed improvements on the land and the Forest Service of the Department of Agriculture has determined that the land sought by the applicant is more valuable for forest purposes than for agricultural and grazing uses.

Withdrawals and Reservations: Power Sites 2322.1
Reclamation 2323

An Indian allotment application for withdrawn land must be rejected.

Appeals Procedure: Generally (Laches) 1840

Where an application for an Indian allotment which was filed in 1967 is rejected by the Land Office and the record shows on appeal that an application for the same land was previously applied for by applicant's father, for her benefit, and that application was rejected in 1918 by the General Land Office, an appeal requesting reconsideration of the 1918 decision is subject to rejection because of laches.

Delia Curl Souza, Sacramento 1253 (May 13, 1968)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1968 MAY 20 AM 10 00

In reply refer to:
704
Sacramento 1253

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D.C. 20240

May 13, 1968

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

Delia Curl Souza : Indian Allotment Application
:

Decision Affirmed as Modified

Mrs. Delia Curl Souza has appealed from a decision of the Sacramento Land Office, dated January 16, 1968, rejecting her application for an Indian Allotment, filed on December 4, 1967, under Section 31, Act of June 25, 1910, 36 Stat. 863; 25 U.S.C. 337, for 159.37 acres of certain described land, located within the Shasta National Forest, for the following reasons:

1. The described land has been withdrawn from entry under the public land laws by a power site withdrawal, since April 14, 1922 and by a First Form Reclamation Withdrawal, since July 29, 1936.

2. An allotment application cannot be allowed for National forest land where the Indian has not lived on, occupied or placed improvements on the land and the Forest Service of the Department of Agriculture has determined that the land sought is more valuable for forest purposes than for agricultural or grazing uses.

The appellant alleges as follows in her first statement of reasons for appeal;

1. When she was a minor living with her father, "he had taken out an allotment for me on the same parcel of land. To my knowledge, he had never been notified that the application had been denied * * * he died in 1938."

2. Her ancestors lived in the area where the land is located for years before the coming of the white man,

3. Her allotment papers were uncovered in the Archives in Washington, D. C. by a person who had thereafter died in an acident in 1955 and she has, since then, "been trying to establish our rights and claims to the allotments applied for."

4. She feels that she has a valid right and claim by virtue of her use and occupancy during her childhood 1/

1/ The applicant was born in 1905.

because, she would still have been living there "if Shasta Dam and Shasta Lake did not go in."

5. According to Bureau decisions, the area in question is not forest land, its a "recreation area."

6. She was never notified of the withdrawal.

The appellant's statement of reasons for appeal also states that she had enclosed some copies of papers from the Archives in Washington, D. C., however, no such papers were received in this office.

Subsequently, and after a proposed appeals decision had been prepared in this case, Mrs. Souza retained as her attorneys the Indian Services Division of the California Rural Legal Assistance Office. These attorneys requested and were granted an extension of time in which to submit an additional statement of reasons for appeal. In addition, this office sent to them a copy of the proposed decision which states, in pertinent part, that:

> All land disposals by the Bureau of Land Management are and must be made in the manner provided by law and the departmental regulations thereunder. The appellant has submitted no evidence showing that any Indian allotment application had been filed for her in what was then known as the General Land Office. But, assuming that it had Mrs. Souza impliedly admits that no action had been taken on that application. The Department has ruled that no vested right is secured in an allotment by the filing of an application. See Clark, Jr. v. Benally et al (on rehearing), 51 L.D. 98, 101 (1925). The Department has also held that the law does not confer upon an Indian a vested right to an allotment of public lands thereunder, and such right cannot be acquired prior to the fulfillment of all of the conditions set forth in the act. See Martha Head et al., 48 L.D. 567, 571 (1922). In another case, relevant to the issues raised in this appeal, it was held that an application filed prior to a withdrawal cannot prevent the withdrawal from attaching to the land sought, such application being incomplete and having initiated rights in futuro only, contingent upon events not certain to occur, not rights in esse within the meaning of the term "existing valid rights" in the saving clause of the order. George J. Propp, 56 I.D. 347, 353 (1938). See also Solicitor's Opinion M-36659, 70 I.D. 429 (1963).
>
> It is not unusual for designated areas of forest lands to be devoted to public recreation. This does not change the legal status of such lands as forest lands. Bureau records show that all of sections 1 to 12 of T. 34 N., 4 W., M.D., were added to the Shasta National Forest by the Act of March 14, 1948, Public Law 449 H.R. 3175, 80th Congress, effective July 1, 1948.

> The case record shows that from an inspection of the land and from admissions made by the applicant in her application, she is not living on and has placed no improvements on the land in issue. The Department of Agriculture had determined that the subject land is more valuable for National Forest purposes than for agriculture. An applicant under the 1910 Act, supra, cannot qualify to enter land, where it has been determined that the land sought is more valuable for forest purposes than for agricultural or grazing uses. Robert Minkey et al., A-30706 (March 28, 1967).

The rationale quoted above is correct and is hereby adopted for incorporation into this decision.

The additional statement of reasons for appeal made no attempt to refute the legal merit of the foregoing proposed decision. Instead, it alleges for the first time the following:

> In 1913 William Curl made allotment applications (Sacramento 06030 through 06035) for his minor children, one of whom is the present applicant (06032) under Section 4 of the Act of Feb. 8, 1887 (24 Stat. 388, as amended /presently 25 U.S.C. § 334/. On April 13, 1918, those applications were denied, although the land sought was then open to allotment and no-one denied that Mr. Curl and his children lived there. The sole reason for denying the applications, as stated in Interior Department letters of April 2, 1918 (06030-13 at 06030-15) and July, 1918 (06030-4 at 06030-5) was that the Oliver Keller case (44 L.D. 520 (1916)) had decided that parents could not obtain allotments for minor children born after the parents had obtained allotments for themselves, and Mr. Curl's children were all born more than seven years after Mr. Curl obtained an allotment in 1890.

The appellant contends that the Keller decision was wrongly decided, the 1887 Act, supra, does not turn Indian Allottees into non-Indians, her claim should not be denied because her father did not appeal from the denial of his applications and, therefore, since the father's applications should have been granted, her application should be granted now.

The 1887 Act, supra, and the Keller decision, supra, make no attempt whatsoever to turn Indians into non-Indians. They merely deny, as a matter of law, the benefits of the 1887 Act to after-born children. In fact, the Keller decision expressly states that:

* * * * *

> The practice of the Indian Office has been to deny the right of allotment on the public domain under the fourth section

> /of the 1887 Act/ to Indians born after the closing of the rolls to the tribe with which membership is claimed, the same as to allotments of reservation lands under the first section * * * .

Furthermore, even if Mrs. Souza had not been barred from a legal remedy under the rule of res adjudicata, she would be barred from such relief under the rule of laches. Mrs. Souza, having been born in 1905, reached her 21st birthday in 1926, and she took no action to assert her rights, thereafter, until she filed her application for an allotment in 1967 - 41 years after she reached her 21st birthday. The Department has held that a party defeated by the decision of the Land Department may not wait many years after an adverse decision and then assert that she is entitled to relief from its consequences. State of New Mexico, Robert M. Wilson, Lessee v. Robert S. Shelton and John T. Williams, 54 I.D. 112, 120, 121 (1932); M. D. Waldron, A-28703 (January 31, 1962).

The second statement of reasons filed on behalf of the appellant contains the following assertion:

> In this case the Interior Department breached its fiduciary duty in a most flagrant manner. Having to choose between keeping certain land for itself or transferring it to those of its wards who were Mr. Curl's children, the Government kept the land for itself. This was done in violation of a statute which said the children were entitled to the land * * * .

Assuming, arguendo, that the Secretary and his delegates are not bound to deny an application made under the circumstances of this case, a very recent decision has established that in enacting the General Allotment Act, Congress did not intend to place public domain beyond the discretionary control /of the Secretary/ and vest in individual Indian applicants an absolute right to land of their choice. Finch v. U. S. and Udall, 387 F. 2d 13 (10th Cir. 1967).

Accordingly, the decision is affirmed as herein modified.

Delia Curl Souza is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form Wo 1844-1 and Circular 2137. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240 and the amount of the filing fee will be $5. 2/ In taking an appeal there must be strict

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2/ See Office of Appeals and Hearings decision in Emil F. Toulou, Jr., Oregon 2533 (February 26, 1968).

compliance with the regulations. If an appeal is filed the appellant will have the burden of proving, by presenting positive and substantial evidence, wherein the decision appealed from is in error.

Edward W. Stuebing
Chief, Branch of Land Appeals
Office of Appeals and Hearings

Enclosures 2

DISTRIBUTION:
Lee J. Sclar, Indian Services Division, California Rural Legal Assistance
(Certified Mail)
Mrs. Delia Curl Souza (Certified Mail)
Bureau of Indian Affairs, Sacramento, California
Bureau of Indian Affairs, Washington, D. C.
Hon. Harold T. Johnson, House of Representatives
Regional Forester, Forest Service, U.S. Department of Agriculture
Div. of L&M S&T (4)
Div. of L&M PM (2)
OPD
Appeals List No. 1
MHS

appeal to Sec A-31077 Dismissed 1-15-69

Indian Allotments: Allotments in National Forests 2212.2-3

An application for Indian allotments within a national forest under Section 31 of the Act of June 25, 1910, is properly rejected where the Indians have not lived on, occupied or placed improvements on the land.

Hazel Virginia Grover Nestle et al., Riverside 1616 etc. (October 1, 1968)

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UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

In reply refer to:
704
Riverside 1616
1617
1618

October 1, 1968

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DECISION

Hazel Virginia Grover Nestle et al.	:	Indian Allotment
	:	
	:	

Decisions Affirmed

Hazel Virginia Grover Nestle, for herself and in behalf of her minor children Jeanette Ann Nestle and Carol Jean Nestle, has appealed from separate decisions of the Riverside District and Land Office, dated August 12, 1968, rejecting their application for the allotment of certain lands within the Los Padres National Forest, filed under Section 31 of the Act of June 25, 1910, 36 Stat. 863, 25 U.S.C. 337, 1/ for the reason that the Forest Service, U. S. Department of Agriculture has determined that the application cannot be favorably considered because:

1. The land sought has reserved public domain status and settlement has not been made by the applicant in accordance with the Forest Allotment Act.

2. The applicant has placed no improvements on the land in accordance with the Forest Allotment Act.

3. The applicant is not occupying or living on the land in accordance with the Forest Allotment Act.

4. The land is more valuable for National Forest purposes under the Acts of June 4, 1897 (30 Stat. 34; 16 U.S.C. 475) and June 12, 1960 (74 Stat. 215; 16 U.S.C. 528-531), than for agricultural settlement.

5. Since repeal of the Forest Homestead Act on October 23, 1962, there is no law authorizing entry on National Forest land for settlement.

The appellant alleges, citing Finch v. United States, 387 F. 2d 13 (10th Cir. 1967), that settlement is a condition subsequent to classification and not a condition precedent. She also alleges, citing the language in the decision

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1/ The application states that it was filed under the provisions of Section 4 of the Act of February 8, 1887, 24 Stat. 338, 25 U.S.C. 334 and the 1910 Act, supra. The 1887 Act applies only to public domain lands "not otherwise appropriated," whereas the 1910 Act applies to national forest lands. Consequently, since all the applied for lands are in a national forest, the 1887 Act, except for certain procedures, is not applicable to these cases.

that her "right to allotment persists." In addition, she contends that no criteria have been furnished the applicant showing that the land is more valuable for national forest purposes than for agricultural settlement. She also asserts that the 1962 Act cannot be construed as in any way restricting her locating or developing the lands.

The appellants' application was filed in the regional forest service office on January 23, 1968.

The legal issue in the Finch decision is the eligibility of those appellants "as Indians to receive an allotment of lands from the public domain under the terms of 25 U.S.C. § 334." The appellant does not deny that the lands for which she has applied are in a national forest. The provisions of the 1887 Act, supra, and the provisions of the 1910 Act, supra, even though they both apply to Indians, are essentially very different. Therefore, insofar as the Finch decision considers the provisions of the 1887 Act, it is not applicable to the issues in these cases.

Aside from the fact that the 1887 Act applies only to public domain lands which are under the exclusive jurisdiction of the Secretary of the Interior and the 1910 Act applies only to national forest lands which are under the administrative control of the Secretary of Agriculture, the 1910 Act requires as a condition precedent that allotments within national forests be in conformity with the general allotment laws and may be made

> * * * to any Indian occupying, living on, or having improvements on land included within any such national forest * * *.

Consequently, there is no merit to the appellants' allegation that settlement is a "condition subsequent." This fact alone is a sufficient reason for rejecting the application. Robert Minkey et al., A-30706 (March 28, 1967).

In view of the determination that the appellant and her two minor children not only do not, but, under the facts of this case, cannot qualify under the 1910 Act, it is not necessary to discuss the merits of her other allegations.

Hazel Virginia Grover Nestle and each of her two minor children are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. The filing fee will be computed on the basis of $5 for each allotment claim included in the appeal. If the appeal covers all claims adversely affected by this decision the total filing fee is $15. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving, by presenting positive and substantial evidence, wherein the decision appealed from is in error.

In the event of an appeal, the adverse party to be served is:

Regional Forester, California Region
Forest Service, Department of Agriculture
630 Sansome Street
San Francisco, California 94111

Edward W. Stuebing
Chief, Branch of Land Appeals
Office of Appeals and Hearings

Enclosures

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Div. of L&M S&T (4)
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OPD
Appeals List No. 1

appeal to Sec. A-31091. Dismissed 1-15-69

Indian Allotments: Allotments in National Forests 2212.2-3

Applications for Indian allotments within a national forest, under Section 31 of the Act of June 25, 1910, are properly rejected where the applicants have not lived on, occupied or placed improvements on the lands.

Alice Morgan McGillis, et al., Riverside 1568 etc. (October 21, 1968)

[illegible] OF INTERIOR
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1968 OCT 30 AM 10 00

In reply refer to:
704
Riverside 1568, 1569, 1609,
1610, 1611, 1644,
and 1646

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D.C. 20240

October 21, 1968

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DECISION

Alice Morgan McGillis, Lawrence McGillis, James H. Thompson, Alice Morgan McGillis in behalf of Stephen T. McWilliams and Lawrence J. McWilliams, Elaine F. McGillis Dougherty, and Vivian Dean Thompson : Indian Allotment Applications

Decisions Affirmed

The above named parties have appealed from separate decisions of the Riverside District and Land Office, issued on various dates in August 1968, rejecting their separate applications for the allotment of certain lands, located within the boundaries of the Los Padres National Forest, filed under Section 31 of the Act of June 25, 1910, 36 Stat. 863, 25 U.S.C. 337. The applications were rejected for the reason that the Forest Service, U.S. Department of Agriculture has determined that none of the applications can be favorably considered because in each case:

1. The land sought has reserved public domain status and settlement has not been made by the applicant in accordance with the Forest Allotment Act.

2. The applicant has placed no improvements on the land in accordance with the Forest Allotment Act.

3. The applicant is not occupying or living on the land in accordance with the Forest Allotment Act.

4. The land is more valuable for National Forest purposes under the Acts of June 4, 1897 (30 Stat. 34; 16 U.S.C. 475) and June 12, 1960 (74 Stat. 215; 16 U.S.C. 528-531), than for agricultural settlement.

5. Since repeal of the Forest Homestead Act on October 23, 1962, there is no law authorizing entry on National Forest land for settlement.

The appellants allege in identical statements of reasons for appeal that settlement is a condition subsequent to classification and not precedent,

citing Finch v. United States, 387 F. 2d 13 (10th Cir. 1967). They also allege, citing the language in the Finch decision that their respective "right to allotment persists." In addition, they contend that no criteria has been furnished the applicants showing that the lands applied-for are more valuable for national forest purposes than for agricultural settlement. They also assert that the 1962 Act cannot be construed as in any way restricting their right to locate settlement upon or developing the lands in issue.

The appellants' statements of reasons are identical to that considered in Bureau decision Hazel Virginia Grover Nestle et al., Riverside 1616, etc. (October 1, 1968). In that decision it was pointed out that the legal issue in the Finch decision is the eligibility of those applicants "as Indians to receive an allotment of lands from the public domain under the terms of 25 U.S.C. § 334." Section 334 of the Code pertains to Section 4 of the Act of February 8, 1887, 24 Stat. 338. The 1887 Act applies only to public domain lands that are under the exclusive jurisdiction of the Secretary of the Interior while the 1910 Act, supra, applies only to national forest lands that are under the administrative control of the Secretary of Agriculture. The 1910 Act requires, as a condition precedent, that allotments within national forests be made only to Indians who are "occupying, living on, or having improvements on land included within any such national forest." The appellants do not deny that the lands for which they have applied are in a national forest. Therefore, insofar as the Finch decision considers the provisions of the 1887 Act, supra, it is not applicable to the issues in these cases. Consequently, there is no merit to the appellants' allegations that settlement is a "condition subsequent" under the 1910 Act. This implied admission by the appellants that they have not been occupying, living on, or having improvements on the desired lands is alone a sufficient reason for rejecting their applications. See Robert Minkey et al., A-30706 (March 28, 1967).

In view of the determination that the appellants do not and under the facts in these cases, cannot qualify under the 1910 Act, it is not necessary to discuss the merits of the other allegations made by the appellants in these cases.

Accordingly, the decisions are affirmed.

Each of the above-named appellants are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. The filing fee will be computed on the basis of $5 for each application included in the appeal. If the appeal covers all applications adversely affected by this decision the total filing fee is $45. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving, by presenting positive and substantial evidence, wherein the decision appealed from is in error.

In the event of an appeal by any of these applicants, the adverse party to be served by each appellant is:

Regional Forester, California Region
Forest Service, U.S. Department of Agriculture
630 Sansome St.
San Francisco, California 94111.

Edward W. Stuebing
Chief, Branch of Land Appeals
Office of Appeals and Hearings

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Bureau of Indian Affairs, Washington, D. C.
Bureau of Indian Affairs, Sacramento Area Office
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Div. of L&M PM (2)
OPD
Appeals List No. 1

appeal to Sec A-31079 dismissed 1-15-69

Indian Allotments: Allotments in National Forests 2212.2-3 misc

Application for Indian Allotments within a national forest, under Section 31 of the Act of June 25, 1910, are properly rejected where the Department of Agriculture has determined that the lands involved are more valuable for national forest purposes than for agricultural or grazing purposes.

Jimmy Doyle Fish, Marie Ellen West, Riverside 1558 & 1560 (October 21, 1968)

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1968 OCT 30 AM 10 00

In reply refer to:
704
Riverside 1558 & 1560

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D.C. 20240

October 21, 1968

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DECISION

Jimmy Doyle Fish and Marie Ellen West	: : :	Indian Allotment Applications

Decisions Affirmed

Marie Ellen West and her son Jimmy Doyle Fish have appealed from separate decisions of the Riverside District and Land Office, dated August 8, 1968, rejecting their applications for the allotment of certain lands, located in the Los Padres National Forest, filed under Section 31 of the Act of June 25, 1910, 36 Stat. 863, 25 U.S.C. 337. The applications were rejected for the reasons that:

1. The lands sought have reserved public domain status and they have not been settled upon, improved, or occupied as required by the Forest Allotment Act.

2. The lands are more valuable for national forest purposes, under the Acts of June 4, 1897, 30 Stat. 34, 16 U.S.C. 475 and June 12, 1960, 74 Stat. 215, 16 U.S.C. 528-531, than for agricultural development.

The appellants allege that they have settled upon the land, have made improvements, and have been occupying and living on the lands in accordance with the Forest Allotment Act. As to the second reason for rejecting their applications, they state as follows:

> * * * furnishes no criteria whatsoever for the conclusion arrived at under this rejection.

The appellants, in order to qualify under the 1910 Act, supra, must satisfy all of the applicable requirements. The Act provides as follows:

> That the Secretary of the Interior is hereby authorized in his discretion, to make allotments within the national forests in conformity with the general allotment laws * * * to any Indian occupying, living on, or having improvements on land included within any such national forest who is not entitled to an allotment on any existing Indian reservation, or for whose tribe no reservation has been provided, or whose reservation was not sufficient to afford an allotment to each member thereof. All applications for allotments under the provisions of this section shall be submitted to the Secretary of Agriculture, who shall determine whether the lands applied for are more valuable for agricultural or grazing purposes than for the timber found thereon; and if it be found that the lands applied for are more valuable for agricultural or grazing purposes, then the Secretary of the Interior shall cause allotment to be made as herein provided.

Thus, the Act provides that the making of allotments is in the discretion of the Secretary of the Interior; therefore, if there are reasons why in the exercise of his discretion the Secretary determines that an allotment should not be allowed, this is sufficient reason to reject an allotment application. Robert Minkey et al., A-30706 (March 28, 1967). Second, the Secretary of Agriculture must determine that the lands applied for are more valuable for agricultural or grazing purposes than for the timber found thereon.

In these cases, the appellants do not dispute the determination that the lands in issue are more valuable for national forest purposes than for agricultural or grazing purposes. This Bureau must accept the Department of Agriculture's determination in this matter. See Minkey, supra. Therefore, the rejection of the appellants' applications was correct for this reason alone. In these circumstances, it is not necessary to consider whether the appellants' settlement upon and the improvement and occupation of the lands was proper and timely under the law.

Accordingly, the decisions are affirmed.

Jimmy Doyle Fish and Marie Ellen West are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. The filing fee will be computed on the basis of $5 for each application included in the appeal. If the appeal covers all applications adversely affected by this decision the total filing fee is $10. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving, by presenting positive and substantial evidence, wherein the decision appealed from is in error.

In the event of an appeal by either of these applicants, the adverse party to be served is:

Regional Forester, California Region
Forest Service, U.S. Department of Agriculture
630 Sansome Street
San Francisco, California 94111

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Chief, Branch of Land Appeals
Office of Appeals and Hearings

Enclosures 2

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Forest Supervisor, Los Padres National Forest
Bureau of Indian Affairs, U.S. Department of the Interior
Bureau of Indian Affairs, U.S. Department of the Interior,
  Sacramento Area Office
Div. of L&M S&T (4)
Div. of L&M PM (2)
OPD
Appeals List No. 1

1645 - appeal to Sec A-31086
affirmed 2-2-70

Indian Allotments: Allotments in National Forests 2212.2-3 more

Applications for Indian allotments within a national forest under Section 31 of the Act of June 25, 1910, are properly rejected where the Indians have not lived on, occupied or placed improvements on the lands and the Department of Agriculture has determined that the lands are more valuable for forest purposes than for agricultural and grazing purposes.

Amos A. Hopkins et al., Riverside 1601 and 1645 (October 21, 1968)

In reply refer to:
704
Riverside 1601 and 1645

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D.C. 20240

October 21, 1968

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DECISION

Amos A. Hopkins, in behalf of Hugh :
Steven Geronimo Hopkins, Ross A. :
Neugin :

Indian Allotment Applications

Decisions Affirmed

Amos A. Hopkins in behalf of his minor son Hugh Steven Geronimo Hopkins and Ross A. Neugin have appealed from separate decisions of the Riverside District and Land Office, dated August 15 and 19, 1968, respectively, rejecting their applications for the allotment of certain lands located in the Los Padres National Forest, filed under Section 31 of the Act of June 25, 1910, 36 Stat. 863, 25 U.S.C. 337. The applications were rejected for the reasons that:

1. The lands sought have reserved public domain status and they have not been settled upon, improved, or occupied as required by the Forest Allotment Act.

2. The lands are more valuable for national forest purposes, under the Acts of June 4, 1897, 30 Stat. 34, 16 U.S.C. 475 and June 12, 1960, 74 Stat. 215, 16 U.S.C. 528-531, than for agricultural development.

The appellants allege, in material part, as follows:

1. Rejecting the claims for lack of settlement is without merit, since the court decided in Finch v. United States, 387 F. 2d 13 (10th Cir. 1967) that settlement is a condition subsequent to the allotment.

2. The one-year-old Hopkins child is not specifically required to make settlement upon the land.

3. The applicant Hopkins has complied with the laws under which the claim is established, namely Section 4 of the Act of February 8, 1887, 24 Stat. 338, 25 U.S.C. 334, as amended by the Act of February 28, 1891 and the Act of June 25, 1910, because he has done all he can do to perfect his claim and has complied with the law in every respect.

4. The lands applied for contain no marketable timber. Furthermore, the rule set forth under 25 U.S.C. 337 provides "that the Secretary of the Interior shall cause the allotment to be made if the lands are not more valuable for the timber found thereon than for agricultural or grazing purposes. The subject lands are grazing lands in character." (Emphasis appellants').

They also make a general allegation of prejudice against the Indian people.

The appeals in these cases not only contain mistatements of the law and the facts, but they show a misunderstanding of the nature and scope of Land Office functions. For example, the appellants allege that settlement upon the land is a condition subsequent to qualification and not a condition precedent; citing the Finch decision, supra. The Finch decision considers only the provisions of the 1887 Act, supra, and not the 1910 Act, supra. Thus, even though both laws apply to Indians, the 1887 Act is applicable only to public domain lands that are under the exclusive jurisdiction of the Secretary of the Interior, while the 1910 Act applies only to national forest lands that are under the concurrent jurisdiction of the Secretary of Agriculture. These separate jurisdictions have been established by law and the 1910 statue requires the Secretary of Agriculture to make the determination of relative value. Robert Minkey et al., A-30706 (March 28, 1967). The legal issue in the Finch decision is the eligibility of those appellants "as Indians to receive an allotment of lands from the public domain under the terms of 25 U.S.C. § 334." This U.S. Code citation is the 1887 Act and it is not relevant to the legal issues in these cases. Consequently, the contention that settlement is a "condition subsequent" to qualification for an allotment under the 1910 Act is without merit.

The provisions of the 1910 Act, 25 U.S.C. 337 are as follows:

> That the Secretary of the Interior is hereby authorized, in his discretion, to make allotments within the national forests in conformity with the general allotment laws * * * to any Indian occupying, living on, or having improvements on land included within any such national forest who is not entitled to an allotment on any existing Indian reservation, or for whose tribe no reservation has been provided, or whose reservation was not sufficient to afford an allotment to each member thereof. All applications for allotments under the provisions of this section shall be submitted to the Secretary of Agriculture, who shall determine whether the lands applied for are more valuable for agricultural or grazing purposes than for the timber found thereon; and if it be found that the lands applied for are more valuable for agricultural or grazing purposes, then the Secretary of the Interior shall cause allotment to be made as herein provided.

The appellants' attention is particularly invited to that part of the law which "authorized" the Secretary "in his discretion, to make allotments." Attention is also invited to that part of the Department's Minkey decision, supra, which notes that where the allowance of an allotment is discretionary with the Secretary of the Interior, an Indian has no vested right to an allotment of a particular parcel of land; citing Daniels v. United States, 247 F. Supp. 193 (D.C.W.D. Okla. 1965). Consequently, the purported quotation from the law

which supposedly directs the Secretary of the Interior to make allotments is nonexistent. In these circumstances, the allegation that the appellant Hopkins "has complied with the law in every respect" is not established.

In view of the foregoing, the appellants' charge of prejudice against the Indian people or, perhaps more particularly the appellants in these cases is completely unwarranted.

The decisions are affirmed.

Amos A. Hopkins and Ross A. Neugin are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. The filing fee will be computed on the basis of $5 for each application included in the appeal. If the appeal covers all applications adversely affected by this decision the total filing fee is $10. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving, by presenting positive and substantial evidence, wherein the decision appealed from is in error.

In the event of an appeal by any of these applicants, the adverse party to be served by each appellant is the

Regional Forester, California Region
Forest Service, U.S. Department of Agriculture
630 Sansome St.
San Francisco, California 94111

Edward W. Stuebing
Chief, Branch of Land Appeals
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DISTRIBUTION:
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Bureau of Indian Affairs, Sacramento Area Office
Div. of L&M S&T (4)
Div. of L&M PM (2)
OPD
Appeals List No. 1

Indian Allotments: Allotments in National Forests 2212.2-3

Applications for Indian allotments within a national forest under Section 31 of the act of June 25, 1910, are properly rejected where the Indians have not lived on, occupied or placed improvements on the land and the Department of Agriculture has determined that the land is more valuable for forest purposes than for agriculture and grazing purposes.

Kenneth M. Kale, Riverside 1602 (October 29, 1968)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1968 NOV 12 PM 12 25

In reply refer to:
704
Riverside 1602
October 29, 1968

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

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DECISION

Kenneth M. Kale : Indian Allotment
:
Decision Affirmed

Mr. Kenneth M. Kale has appealed on behalf of his minor child, Kristopher Kenneth Kale, from a decision of the Riverside District and Land Office, dated August 15, 1968, rejecting his child's application for the allotment of certain lands within the Los Padres National Forest, filed under Section 31 of the Act of June 25, 1910, 36 Stat. 863, 25 U.S.C. 337. 1/ The application was rejected at the request of the Forest Service, U. S. Department of Agriculture, which determined that the application could not be favorably considered for the following reasons:

1. The land sought has reserved public domain status and settlement has not been made by the applicant in accordance with the Forest Allotment Act.

2. The applicant has placed no improvements on the land in accordance with the Forest Allotment Act.

3. The applicant is not occupying or living on the land in accordance with the Forest Allotment Act.

4. The land is more valuable for National Forest Purposes under the Acts of June 4, 1897 (30 Stat. 34; 16 U.S.C. 528-531), than for agricultural settlement.

5. Since repeal of the Forest Homestead Act on October 23, 1962, there is no law authorizing entry on National Forest land for settlement.

1/ The application states that it was filed under the provisions of Section 4 of the Act of February 8, 1887, 24 Stat. 338, 25 U.S.C. 334 and the 1910 Act, supra. The 1887 Act applies only to public domain lands "not otherwise appropriated," whereas the 1910 Act applies to national forest lands. Consequently, since all the applied for lands are in a national forest, the 1887 Act, except for certain procedures, is not applicable to this case.

Appellant alleges, inter alia, that although the Department of Agriculture has determined that the land is more valuable for timber than for agricultural purposes there is no timber on the lands; that he is a settler on the public domain on his own allotment claim and therefore there is no need for his minor son to make actual settlement on the lands applied for under 43 CFR 2212.0-6 Subpart 3-d. In addition appellant alleges, citing Finch v. United States, 387 F. 2nd 13 (10th. Cir. 1967), that the rejection of his application was wrong because settlement is a condition subsequent to classification rather than a condition precedent.

The appellant's application was filed in the regional forest service office on January 10, 1968, pursuant to Section 31 of the Act of June 25, 1910, supra, which provides as follows:

> That the Secretary of the Interior is hereby authorized in his discretion, to make allotments within the national forests in conformity with the general allotment laws, to any Indian occupying, living on, or having improvements on land included within any such national forest who is not entitled to an allotment on any existing Indian reservation, or for whose tribe no reservation has been provided, or whose reservation was not sufficient to afford an allotment to each member thereof. All applications for allotments under the provisions of this section shall be submitted to the Secretary of Agriculture, who shall determine whether the lands applied for are more valuable for agricultural or grazing purposes than for the timber found thereon; and if it be found that the lands applied for are more valuable for agricultural or grazing purposes, then the Secretary of the Interior shall cause allotment to be made as herein provided.

It is clear from the language in the act that the authority vested in the Secretary of the Interior to make Indian allotments in the national forests is discretionary and not mandatory, and such allotments will be made only upon a determination by the Secretary of the Agriculture that the lands applied for are more valuable for agricultural or grazing purposes.

In this case the Regional Forester acting on behalf of the Secretary of Agriculture has determined that this land is not valuable for agricultural or grazing purposes. He has specifically ruled that the land is more valuable for national forest purposes as contemplated by the Acts of June 4, 1897, (30 Stat. 34, 16 U.S.C. 475) and June 12, 1960 (74 Stat. 215; 16 U.S.C. 528-531). Although appellant has alleged that there is not timber on this land, under these statutes the use of national forest lands is not solely restricted to timber production. These acts set forth a policy of administering the forest lands to protect the public interest in securing a timber supply, in watershed control (the act of June 4, 1897), and in multiple use

(the act of June 12, 1960), specifically for outdoor recreation, range, timber, watershed, and wildlife and fish purposes. Robert Minkey et al., A-30706 (March 28, 1967).

Appellant has not presented any evidence other than his own unsupported statements to refute the report of the Forest Service that this land was not agricultural in character. Under the circumstances we are bound to accept the Department of Agriculture's determination in this matter. See Robert Minkey et al., supra.

Section 31 of the 1910 Act, supra, authorizes the Secretary of the Interior to make allotments in national forests only if the Indian applicant is occupying, living on, or has improvements on the land. Appellant openly admits that he has not complied with these requirements, but alleges that settlement is a condition subsequent to classification, citing Finch v. United States, supra, and that settlement is not needed where the application is filed on behalf of his minor son.

The legal issue in the Finch decision is the eligibility of those appellants "as Indians to receive an allotment of lands from the public domain under the terms of 25 U.S.C. Sec. 334." The provisions of the 1887 Act, supra, and the provisions of the 1910 Act, supra, even though they both apply to Indians, are essentially different. Therefore, insofar as the Finch decision considers the provisions of the 1887 Act as applied to public domain lands, it has no bearing on the issues of this case where the lands applied for are in a national forest.

Appellant's contention that no actual settlement is needed by his minor child is also without merit. Such a circumstance only prevails where the application is filed for public domain land and where the parent has settled and made his own home upon public domain not otherwise appropriated. Cynthia Martha Sweeney, 40 L.D. 148 (1911). Appellant has provided no evidence to verify his own public domain allotment. Further, this merely appears to be an attempt to avoid the occupation and settlement needed to acquire a forest allotment.

In view of the fact that Appellant has not met any of the requirements of the 1910 Act the application was properly rejected. Accordingly, the decision appealed from is affirmed.

Kenneth M. Kale is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240 and the amount

of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving, by presenting positive and substantial evidence, wherein the decision appealed from is in error.

Edward W. Stuebing
Chief, Branch of Land Appeals
Office of Appeals and Hearings

Enclosures 2

DISTRIBUTION
Mr. Kenneth M. Kale (Certified Mail)
Div L&M S&T (4)
Div L&M PM (2)
Appeals List No. 1
OPD
Regional Forester, USDA, San Francisco, Calif.

appeal to Sec affirmed as Modified A-31094 4-23-69

misc

Indian Allotments: Allotments in National Forests 2212.2-3

An application for an Indian Allotment within a national forest, under Section 31 of the Act of June 25, 1910, is properly rejected where the Department of Agriculture has determined that the land involved is more valuable for national forest purposes than for agricultural or grazing purposes.

John D. Ratterree, Riverside 1551 (November 12, 1968)

U.S. DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1968 NOV 22 AM 11 12

In reply refer to:
704
Riverside 1551

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D.C. 20240

November 12, 1968

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

John D. Ratterree : Indian Allotment Application
:

Decision Affirmed

John D. Ratterree has appealed from a decision of the Riverside District and Land Office, dated July 25, 1968, rejecting his application for the allotment of certain described land, located within the boundaries of the Los Padres National Forest, filed under Section 31 of the Act of June 25, 1910, 36 Stat. 863, 25 U.S.C. 337. The application was rejected for the reasons that:

1. The land sought has reserved public domain status and settlement has not been made by the applicant in accordance with the Forest Allotment Act.

2. The applicant has placed no improvements on the land in accordance with the Forest Allotment Act.

3. The applicant is not occupying or living on the land in accordance with the Forest Allotment Act.

4. The land is more valuable for National Forest purposes under the Acts of June 4, 1897 (30 Stat. 34; 16 U.S.C. 475), and June 12, 1960 (74 Stat. 215; 16 U.S.C. 528-531), then for agricultural settlement.

The appellant alleges that he is occupying the land and that there is a cabin on the land. The appellant also refers to Finch v. United States, 387 F. 2d 13 (10th Cir. 1967), which case held that settlement under the allotment act is a "condition subsequent" to allotment.

The 1910 Act, supra, provides that the making of allotments is in the discretion of the Secretary of the Interior; therefore, if there are reasons why in the exercise of his discretion the Secretary determines that an allotment should not be allowed, this alone is sufficient to reject an allotment application. Robert Minkey et al., A-30706 (March 28, 1967). Also, to qualify for an allotment under the 1910 Act, the Secretary of Agriculture must determine that the lands applied for are more valuable for agricultural or grazing purposes than for the timber found thereon. Except for a statement to the effect that the decision furnishes no criteria for the conclusion, the appellant does not dispute the determination that the applied-for land is more valuable for national forest purposes than for agricultural or grazing purposes.

Furthermore, this Bureau must accept the Department of Agriculture's determination as to whether the land in issue is more valuable for national forest purposes than for agriculture or grazing purposes. See Minkey, supra. Therefore, the rejection of the appellant's application was proper for this reason alone.

Finally, the Finch decision, supra, applies only to public domain lands under Section 4 of the Act of February 8, 1887, 24 Stat. 338 and not to forest lands under the 1910 Act. Consequently, there is no merit to the allegation that settlement is a "condition subsequent" under the 1910 Act.

Accordingly, the decision is affirmed.

John D. Ratterree is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240 and the amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving, by presenting positive and substantial evidence, wherein the decision appealed from is in error.

In the event of an appeal, the adverse party to be served is:

Regional Forester, California Region
Forest Service
U. S. Department of Agriculture
630 Sansome Street
San Francisco, California 94111

Edward W. Stuebing
Chief, Branch of Land Appeals
Office of Appeals and Hearings

Enclosures 2
DISTRIBUTION:
John D. Ratterree (Certified Mail)
Regional Forester, U. S. Forest Service, Department of Agriculture
Forest Supervisor, Los Padres National Forest
Bureau of Indian Affairs, U. S. Department of the Interior
Bureau of Indian Affairs, U. S. Department of the Interior,
    Sacramento Area Office
Div. of L&M S&T (4)
Div. of L&M PM (2)
OPD
Appeals List No. 1

Native Allotments: Allotments in National Forests 2212.2-3

Applications for Indian allotments within a national forest under Section 31 of the act of June 25, 1910, are properly rejected where the Indian has not lived on, occupied, or placed improvements on the land, and where the Department of Agriculture has determined that the land is more valuable for the timber thereon than for agricultural and grazing purposes.

Mattie Hillman Sigsworth, Sacramento 2152 (February 18, 1969)

In reply refer to:
141
Sacramento 2152

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D.C. 20240

February 18, 1969

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

Mattie Hillman Sigsworth : Indian Allotment Application
:

Decision Affirmed

On August 30, 1968, Mattie Hillman Sigsworth filed her application for an allotment of 40 acres described by metes and bounds within the S½NE¼, N½SE¼ sec. 15, T. 10 N., R. 5 E., Humboldt meridian, California, under Section 31 of the act of June 25, 1910 (36 Stat. 863; 25 U.S.C. 337). The application was rejected by Sacramento office letter-decision of December 9, 1968, because the applicant had not met the two basic requirements of the 1910 act, *supra*, that she must be "occupying, living on, or having improvements" on the land, and that the Secretary of Agriculture must determine that the land applied for is more valuable for agricultural or grazing purposes than for the timber thereon.

On August 28, 1968, the Regional Forester, U. S. Forest Service, acting on behalf of the Secretary of Agriculture, forwarded Mrs. Sigsworth's application to the Bureau's Sacramento office for filing, and reported that the applicant did not have any improvements on the land, nor reside on, nor otherwise occupy the land at the time of the 1910 Act. Her residence dated from August 1967 when she purchased the improvements thereon, placed on the land by a mining claimant some years before. The Regional Forester further stated that he had determined that the land is more valuable for the timber thereon than for agricultural settlement.

The records show that the land in question was withdrawn for the Klamath Forest Reserve by Proclamation of May 6, 1905, and transferred to the Six Rivers National Forest by Proclamation No. 2733 of June 3, 1947. The land is also within Power Site Classification No. 116, by Departmental order of September 19, 1925, pursuant to Section 24 of the Federal Power Act of 1920 (41 Stat. 1075; 16 U.S.C. 818).

In her appeal from the Sacramento office rejection of her application, Mrs. Sigsworth states that the decision is not justified because she doesn't want the timber, but only a portion of the land, and that the tract she would like contains no timber. She has offered no information to show that she has met the requirement for occupancy and improvements, or to refute the Secretary of Agriculture's determination that the land is more valuable for forest purposes than for agricultural or grazing purposes.

The Department has held that applications for Indian allotments within a national forest under Section 31 of the act of June 25, 1910, are properly rejected where the Indians have not lived on, occupied, or placed improvements on the land and the Department of Agriculture has determined that the land is more valuable for forest purposes than for agriculture and grazing purposes. Robert Minkey, et al., A-30706 (March 28, 1967).

Accordingly, it was proper for the Sacramento office to reject Mrs. Sigswoth's application, and that decision is affirmed.

Mrs. Sigsworth is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240 and the amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving, by presenting positive and substantial evidence, wherein the decision appealed from is in error.

Edward W. Stuebing
Chief, Branch of Land Appeals
Office of Appeals and Hearings

Enclosures 2

DISTRIBUTION:
Mrs. Sigsworth (Certified Mail)
300 (6)
200
Regional Forester, USDA, San Francisco, California
Appeals List No. 1

Indian Allotments: Allotments in National Forests 2212.2-3

An application for an Indian Allotment within a national forest, under Section 31 of the Act of June 25, 1910, is properly rejected where the Department of Agriculture has determined that the land involved is more valuable for national forest purposes than for agricultural or grazing purposes.

Virgil Holdge, Riverside 2089 (April 11, 1969)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO, LAND OFFICE
1969 APR 25 AM 10 00

In reply refer to:
141
Riverside 2089

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D.C. 20240

April 11, 1969

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

Virgil Holdge : Indian Allotment Application
:

Decision Affirmed

Virgil Holdge has appealed from a decision of the Riverside District and Land Office, dated March 5, 1969, rejecting his application for the allotment of 160 acres of certain land within the Los Padres National Forest, filed under Section 31 of the Act of June 25, 1910, 36 Stat. 863, 25 U.S.C. 337, for the reasons that:

1. The lands sought have reserved public domain status and they have not been settled upon, improved, or occupied, as required by the Forest Allotment Act.

2. The applied for lands are more valuable for national forest purposes, under the Act of June 4, 1897, 30 Stat. 34, 16 U.S.C. 475 and June 12, 1960, 74 Stat. 215, 16 U.S.C. 528-531, than for agricultural development.

The appellant alleges as follows:

1. The land is allotable under 43 CFR 2212.0-7 and 2212.2-3.

2. A procedure is set forth within section 2212.2-3, supra, for Forest Service and Bureau of Land Management officials to follow but they chose to disregard it.

3. The improvement requirement has been repealed.

4. The words "settlement" or "improvements" are not used in the allotment laws.

5. There has been no lack of settlement, in that the land has been "posted with signs."

6. The lands are not more valuable as national forest lands because they are devoid of timber.

The provisions of the 1910 Act, supra, are as follows:

> That the Secretary of the Interior is hereby authorized in his discretion, to make allotments within the national forests in conformity with the general allotment laws * * * to any Indian occupying, living on, or having improvements on land included within any such national forest who is not entitled to an allotment on any existing Indian reservation, or for whose tribe no reservation has been provided, or whose reservation was not sufficient to afford an allotment to each member thereof. All applications for allotments under the provisions of this section shall be submitted to the Secretary of Agriculture, who shall determine whether the lands applied for are more valuable for agricultural or grazing purposes than for the timber found thereon; and if it be found that the lands applied for are more valuable for agricultural or grazing purposes, then the Secretary of the Interior shall cause allotment to be made as herein provided.

The 1910 Act, supra, provides that the making of allotments is in the discretion of the Secretary of the Interior; therefore, if there are reasons why in the exercise of his discretion the Secretary determines that an allotment should not be allowed, this alone is sufficient to reject an allotment application. Robert Minkey et al., A-30706 (March 28, 1967). Also, to qualify for an allotment under the 1910 Act, the Secretary of Agriculture must determine that the lands applied for are more valuable for agricultural or grazing purposes than for the timber found thereon.

Furthermore, this Bureau must accept the Department of Agriculture's determination as to whether the land in issue is more valuable for national forest purposes than for agriculture or grazing purposes. See Minkey, supra.

The appellant's citation of 43 CFR 2212.0-7 is not pertinent because it applies to lands "not reserved" from Indian settlement; the lands in issue are reserved. The appellant's citation of 43 CFR 2212.2-3 is not helpful to him because the Secretary of Agriculture has determined that the land applied for are more valuable for national forest purposes than for agricultural or grazing purposes.

In view of the controlling nature of the foregoing, it is not necessary to discuss the appellant's other allegations.

Accordingly, the decision is affirmed.

Virgil Holdge has the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240 and the amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. The appellant must show wherein the decision appealed from is in error.

In the event of an appeal, the adverse party to be served is:

Regional Forester, California Region
Forest Service
U.S. Department of Agriculture
630 Sansome Street
San Francisco, California 94111

Edward W. Stuebing
Chief, Branch of Land Appeals
Office of Appeals and Hearings

Enclosures 2

DISTRIBUTION:
Virgil Holdge (Certified Mail)
Regional Forester, U.S. Forest Service, Department of Agriculture
Forest Supervisor, Los Padres National Forest
Bureau of Indian Affairs, U.S. Department of the Interior
Bureau of Indian Affairs, U.S. Department of the Interior,
Sacramento Area Office
300 (6)
200
Appeals List No. 1

Indian Allotments: Allotments in National Forests 2212.2-3

Indian Allotment applications for lands located in national forests are properly rejected where the Forest Service has determined by an examination of the lands that the applied-for tracts are more desirable for retention in public ownership to protect the watershed and minimize siltation into Lake Piru and where the tracts are too rough, dry, barren and devoid of forage to be characterized as valuable either for agriculture or grazing.

Leon J. Holdge et al., Riverside 2087 etc. (September 12, 1969)

DEPT. OF INTERIOR
BUR. OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1969 OCT 6 AM 10 00

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D.C. 20240

In reply refer to:
141
Riverside 2087, 2088,
2090, & 2098
September 12, 1969

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DECISION

Leon J. Holdge, :
Kathleen Trickel (Holdge) : Indian Allotment
John B. Cash :
Gene D. Ratterree :
:

Decisions Affirmed

Each of the above-named persons have appealed from separate decisions of the Riverside District and Land Office, issued on various dates in March 1969, rejecting their separate applications filed under Section 31 of the Act of June 25, 1910, 36 Stat. 863, 25 U.S.C. 337, as amended, for certain described 160 acre tracts of lands located in the Los Padres National Forest for the reasons that:

1. The lands sought have reserved public domain status and they have not been settled upon, improved, or occupied, as required by the Forest Allotment Act.

2. The applied-for lands are more valuable for national forest purposes, under the Acts of June 4, 1897, 30 Stat. 34, 16 U.S.C. 475 and June 12, 1960, 74 Stat. 215, 16 U.S.C. 528-531, than for agricultural development.

Leon Holdge and John Cash allege that the lands for which they have applied "are grazing lands in character and are void of timber and as such are allotable lands under the provisions of 43 Code of Federal Regulations 2212.2-3." Kathleen Trickel (Holdge) alleges that the 160 acres she has applied-for is "nonirrigable grazing lands void of timber." She also alleges that Bureau officials are disregarding 43 CFR 2212. Gene Ratterree alleges as follows:

1. The forestry allotment act does not apply to an Indian.

2. The Act of June 25, 1910 says that if the land is found more valuable for the timber found thereon allotment shall be denied, but, "if not it shall be issued."

A report from the Forest Service states that the south-half or 80 acres of the tract applied-for by Leon Holdge is patented land that no longer belongs to the Government. As to the remaining 80 acres, the land is described as

steep and brush-covered. The slope is estimated to run from 20% to 60% and most of it is rocky. The estimated grazing capacity of that tract is estimated at 12 AUM's or enough to support one cow on a year-round basis if water was available. However, the intermittent stream on the land usually dries up by June of each year. The Forest Service is managing the land for grazing only as a supplement for adjacent landowners, but, the parcel would not be considered economical as a separate unit. Also, this land is being used for watershed protection. Therefore, the Forest Service recommends that the land not be classified for allotment.

The Forest Service report in the case of Kathleen Trickel (Holdge) states that the east-half or 80 acres of the applied-for tract is private patented land. The remaining 80 acres contain 15% to 75% slopes that are very rugged and irregular. An intermittent stream runs through the land only during the few wet months. The grazing capacity of the parcel is only 5 AUM's, or enough to support one cow for five months if water was available. This land is also required to be retained for watershed protection. Therefore, since the land is not suitable for agriculture or grazing it is not recommended for allotment purposes.

The Forest Service report in the case of John B. Cash shows that the southeast quarter of the parcel or 40 acres is private patented land. The remaining 120 acres are similar to the land described in Leon Holdge's case, except that here, the grazing capacity of the land is estimated at 17 AUMs; less than 2 cows on a year-round basis if water was available.

In the case of Gene Ratterree the Forest Service report states that the SE¼NE¼NW¼ of the applied-for quarter-section, or 10 acres, is private patented land. This parcel of land has a grazing capacity of 12 AUMs and could support one cow on a year-round basis if water was available. This parcel is similar to the land described in Leon Holdge's case except that this area also receives high recreational use and must be managed accordingly. Therefore, since the land is not suitable for agriculture or grazing it is recommended that it not be classified for an allotment.

The 1910 Act, supra, provides that the Secretary of Agriculture shall determine whether the lands applied for are more valuable for agriculture or grazing purposes than for the timber found thereon. Thus, the law requires that the lands must first be valuable for agriculture or grazing and then, if they are deemed so to be valuable, they must be found to be more valuable for agriculture or grazing purposes than for the timber found thereon. However, in these cases the lands have been found to be so rough, dry, and barren that they have been determined to be unsuitable for agriculture. Likewise, these tracts cannot be characterized as grazing lands, forage being so sparse as to afford only incidental grazing use.

Almost any land will support a certain number of carefully cultivated plants of some sort, but this fact does not suggest that the land is of agricultural

quality. Similarly, almost any land will afford some limited sustenance to some class of domestic livestock, but this does not warrant a finding that it is grazing land.

An Indian who desires to apply for an allotment under the 1910 Act must submit his application to the Forest Service who will determine whether the land is "chiefly valuable for agricultural or grazing purposes." 43 CFR 2212.2-3. The Forest Service reports state that the average small ranch deemed sufficient to be an economic ranch unit in the general area is 450 head on 6,000 acres and the smallest marginal unit would be 200 head on 5,000 acres. Therefore, it is apparent that the applied-for national forest lands are not valuable for agricultural or grazing purposes. Accordingly, it becomes unnecessary to determine whether the value of the timber found thereon exceeds the value of the land for agricultural or grazing purposes. A finding that the land has a superior value for public purposes for watershed management is a sufficient basis for the exercise of the delegated discretion of the Secretary of the Interior in the rejection of the several applications. The reports and attached topographic maps show these tracts lie near and above Lake Piru and that watershed protection to prevent siltation of the reservoir is a significant public value.

The decisions are affirmed.

Each applicant has the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. The filing fee will be computed on the basis of $5 for each application included in the appeal. If the appeal covers all applications adversely affected by this decision the total filing fee is $20. In taking an appeal there must be strict compliance with the regulations. The appellant must show wherein the decision appealed from is in error.

In the event of an appeal the adverse party to be served is:

Regional Supervisor
Los Padres National Forest
Box 30250
Santa Barbara, California 93105

Edward W. Stuebing
Chief, Branch of Land Appeals
Office of Appeals and Hearings

Enclosures 2

Dist. on page 4

DISTRIBUTION:

Leon J. Holdge (Certified Mail)
Kathleen Trickel (Holdge) (Certified Mail)
John B. Cash (Certified Mail)
Gene D. Ratterree (Certified Mail)
Regional Supervisor, Los Padres National Forest
Regional Forester, U.S. Forest Service, U.S.D.A.
Bureau of Indian Affairs, Washington, D. C.
300 (6)
200
Appeals List No. 1

appeal to Sec
A-31219

Indian Allotments: Allotments in National Forests 2212.2-3

Indian allotment applications for lands located in national forests are properly rejected where the U.S. Forest Service has determined that the applied-for lands are basically timber producing in nature and are not suitable for agriculture or economic grazing.

Donald E. Miller, Sacramento 2456 (September 16, 1969)

DEPT. OF INTERIOR
BUR. OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1969 OCT 6 AM 10 00

In reply refer to:
141
Sacramento 2456

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D.C. 20240

September 16, 1969

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

Donald E. Miller : Indian Allotment
:

Decision Affirmed

Donald E. Miller has appealed from a letter-decision of the Sacramento Land Office, dated March 21, 1969, rejecting his application for an Indian allotment under Section 31 of the Act of June 25, 1910, 36 Stat. 863, 25 U.S.C. 337 as amended, for certain lands located in the Six Rivers National Forest. The reasons given for this adverse action are:

1. The lands were withdrawn from entry by Executive Order dated April 13, 1912, under the Act of June 25, 1910 for Powersite Reserve No. 258.

2. The lands were withdrawn from entry by Departmental Order of November 12, 1920 under Section 24, Act of June 10, 1920, 41 Stat. 1063, for Power Project No. 74.

3. The applicants occupation of the lands from about September 1968, was unlawful and in violation of the rules and regulations of the Secretary of Agriculture. Such use and occupancy constitutes a trespass.

4. The lands are more valuable for national forest purposes under the Acts of June 4, 1897, 30 Stat. 36, and June 12, 1966, 74 Stat. 215, than for agricultural settlement or grazing.

The appellant alleges as follows:

1. Powersite reserve does not include the applied-for lands because such lands were already made a part of the Klamath Forest Reserve by the 1912 Executive Order. Therefore, since these lands were removed from the category of public lands by the Executive Order, the subsequent powersite reserve had no effect upon them.

2. The reservation for Power Project No. 74 was ended by the Federal Power Commission in 1931, when it dismissed the Electro Metals Company application for a power project. In any event, he should be given an opportunity to have the powersite withdrawal vacated or be allowed an allotment subject to power project use.

3. 34 Stat. 3001 which established the Klamath National Forest in 1905 and reserved it from entry and settlement must be deemed amended by the passage of 25 U.S.C. § 337 in 1910.

4. An Indian allotment may not be denied by the unsupported statement that "the land is more valuable for national forest purposes x x x than for agricultural settlement or grazing."

5. The Bureau of Land Management denied him due process of law by not tendering him a copy of the regional forester's report, by not giving him an opportunity to rebut the report's findings or to question the person who made it and by not presenting any facts to support its decision.

This office has received a land-examination report from the Forest Service, dated July 30, 1969, which states, among other things, that about one-half of the applied-for land, including the site where the applicant has constructed his improvements is within the boundaries of the Roselena Mining claim which has been in existence for more than 50 years. This report also states:

> Suitability of the Land. Even if the land was otherwise available, it would not constitute an economic unit for an Indian Allotment. While there are limited openings, most of the area is covered with hardwoods 6-18" in diameter breast high with an understory of scattered Douglas-fir. On an adjacent hillside there are commercial Douglas-fir stands of about twenty thousand board feet per acre. Thus the land is basically timber producing in nature rather than agriculture or grazing land.
>
> The Orleans Ranger District is comprised of about 212,559 acres of National Forest land and 7,810 acres of private land. The latter includes most of the more level land that would be topographically suited to

> agriculture purposes. However, there are no farms within or adjacent to the District. Whereas there have been attempts in the past to develop river bars as gardens or walnut orchards, none has proven sucessful and the areas for the most part have been reclaimed by native vegetation.
>
> Three individuals have a conbined ownership of 40 to 45 head of cattle on the entire district. Each owner runs 10-20 head of cattle as a sideline or hobby and depend on other means of livihood as a principal source of income. Each not only depends on irrigated pastures but finds it necessary to buy supplemental feed. There is no basis for estimating what would be necessary to constitute an economic grazing unit since grazing has never been successfully developed in this area.

The Secretary of Agriculture shall determine whether the lands applied for are more valuable for agriculture or grazing purposes than for the timber found thereon. 43 U.S.C. 337 (1964 ed.) In view of the finding that the tract is not suitable for agriculture or economic grazing, and since this Bureau must accept the report of the Forest Service that the land is basically timber producing in nature, this alone is a sufficient reason for rejecting the appellant's application. See Robert Minkey et al., A-30706 (March 28, 1967).

There is no merit to the contention that this Bureau is under a duty to "tender" the applicant a copy of the regional forest report. The case record is always available for inspection in the Land Office and in those cases where the record has been sent to Washington for consideration of the appeal, it may be returned to the Land Office if the appellant or his attorney requests it. Furthermore, copies of such reports are available through the Land Office for the nominal cost of twenty-five cents per page. See the Schedule of fees for copies, Bureau form 1377-1 (October 1967).

Aside from the withdrawals listed above, the land was also covered by the general withdrawal of November 26, 1934, as amended (Executive Order 6910) so that, as provided in section 7 of the Taylor Grazing Act, as amended (43 U.S.C. 315f), the land was not subject to settlement or occupation until it has been classified and opened to entry. John David Smith et al., A-28829 (September 17, 1962).

In light of these findings, it is not necessary to discuss the other contentions of the appellant.

Accordingly, the decision is affirmed.

Donald E. Miller has the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1

and Circular 2137. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240 and the amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. The appellant must show wherein the decision appealed from is in error.

In the event of an appeal the adverse party to be served is:

Regional Forester
Forest Service
U.S. Department of Agriculture
630 Sansome Street
San Francisco, California 94111

Edward W. Stuebing
Chief, Branch of Land Appeals
Office of Appeals and Hearings

Enclosures 2

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Appeals List No. 1